93-424

Supreme Court, U.S
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No. _____

IN THE

Supreme Court of the United States

October Term, 1993

TRINITY INDUSTRIES, INC.,
Petitioner,

v.

FOREST HENRY SHIPES, *Et Al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

This is an employment discrimination case under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000 *et. seq.*). The questions presented for review are:

1. Whether the United States Court of Appeals for the Fifth Circuit erred in affirming certification of an "across-the-board" class action under *Johnson v. Georgia Highway Express,* 417 F.2d 1122 (5th Cir. 1969), after this Court's decision in *General Telephone Co. v. Falcon,* 457 U.S. 147, 102 S. Ct. 2364, 72 L.Ed.2d 740 (1982)?

2. Whether the Fifth Circuit erred in affirming a back pay award that arbitrarily excludes some members of the class and awards a windfall to others and results in the black class substantially out-earning whites?

PARTIES TO PROCEEDING IN COURT BELOW

The proceeding in the United States Court of Appeals for the Fifth Circuit involved two cases, *Forest Henry Shipes, et al v. Trinity Industries, Inc.,* No. 91-4961 and *Forest Henry Shipes et al v. Robert E. Rader, Jr.,* No. 85-2767. Both appeals were from the United States District Court for the Eastern District of Texas. The two cases were consolidated by the Fifth Circuit. Robert E. Rader, Jr. is not a party to this petition for certiorari. In No. 91-4961 below, the plaintiff and appellee was Forest Henry Shipes. The district court certified the case as an across-the-board class action and designated Shipes as class representative for all black hourly workers at two Trinity plants from 1980-1984. The defendant was Trinity Industries, Inc. which has no parent company and has no subsidiaries other than wholly owned subsidiaries.

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OPINION BELOW

The Fifth Circuit's opinion (*See* Appendix) is officially reported as *Shipes v. Trinity Industries,* 987 F.2d 311 (5th Cir. 1993). The July 30, 1982, order of the district court certifying the across-the-board class action is not officially reported but is reproduced in the appendix. The district court's December 27, 1991 order on damages is not officially reported but is also reproduced in the appendix.

JURISDICTION

The opinion and judgment of the Fifth Circuit Court of Appeals was rendered on April 5, 1993. Trinity's petition for rehearing was denied on June 22, 1993. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

STATUTES INVOLVED

This lawsuit was filed under Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000 e-2(a),(i), which provides

> **(a) Employer Practices.** It shall be an unlawful employment practice for an employer —
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

This suit was filed as an across-the-board class action under Rule 23(a), Federal Rules of Civil Procedure, challenging Trinity's employment practices in initial placement, initial pay, pay raises, promotions, lay-offs and discharges for cause. Rule 23(a) provides

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members if impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

STATEMENT OF THE CASE

Trinity Industries, Inc. manufactures railcars. In the 1960's Trinity opened a plant in West Longview, Texas to manufacture tanks for railroad tank cars. In mid-1979, Trinity opened a plant under different management in East Longview, Texas to manufacture railroad hopper cars. After opening for production, the East Longview plant engaged in rapid, large scale hiring and reached a maximum employment of nearly 450 employees by the end of 1979.

In early 1980 the bottom fell out of the market for railroad hopper cars. Over the next few months, as existing contracts for railcars were completed, Trinity laid off virtually all the employees at the East Longview plant. Ultimately, Trinity was forced to close the East Longview plant and to lay off all but a caretaker crew. Approximately a year later the general recession in the railcar industry forced even the long-established West Longview plant to lay off a number of its employees.

Forest Henry Shipes was hired as a welder's helper at the East Longview plant in October of 1979 during that plant's initial buildup. During the last week of June and the first week of July 1980, Shipes was laid off along with approximately 150 other employees at the East Longview plant.

After he was laid off Shipes filed a charge of discrimination with the Equal Employment Opportunity Commission claiming that he had been denied a pay raise and had been laid off because he was black. The evidence showed that the percentage of blacks employed at the East Longview plant was actually *higher* (23.2%) at the end of the layoffs than at peak employment (23%). When the EEOC expressed doubt that Shipes had been discriminated against because of his race, Shipes requested a right to sue letter rather than wait for the EEOC to make its final determination. Shipes then

filed this across-the-board class action in the Eastern District of Texas, alleging discrimination in initial placement, initial pay, job transfers, pay raises, promotions, layoffs and discharges for cause at the East Longview plant and also at the plant in West Longview.

Trinity vigorously opposed certification of the case as an across-the-board class action. Trinity pointed out that this Court's decision in *General Telephone Co. v. Falcon,* 457 U.S. 147, 102 S. Ct. 2364, 72 L.Ed.2d 740 (1981) restricted the certification of across-the-board class actions previously permitted by *Johnson v. Georgia Highway Express, Inc.,* 417 F.2d 1122 (5th Cir. 1969). Trinity also contended that Shipes was not an adequate class representative for employees at the West Longview plant because employment decisions at the West Longview plant were made independently by different persons than at the East Longview plant, and Shipes had never worked at the West Longview plant and freely admitted he knew nothing about the personnel policies and practices at that plant. Finally, Trinity contended that it was unfair and contrary to established judicial precedent to allow Shipes to bring a suit under Title VII that was far beyond the scope of the complaint filed with the EEOC.

The district court nevertheless certified the case as an across-the-board class action challenging all employment practices at both the East Longview plant and the West Longview plant. In its July 29, 1982 Order, the district court largely disregarded *General Telephone Co. v. Falcon,* stating that the holding in that case was "closely tied to the specific facts of the case" and in "no wise" constituted disapproval of the broad, across-the-board class actions permitted by the Fifth Circuit in *Johnson v. Georgia Highway Express.* Even though the Fifth Circuit subsequently

interpreted *Falcon* to restrict such across-the-board actions in *Vuyanich v. Republic National Bank,* 723 F.2d 1195 (5th Cir. 1984), and even though Trinity again moved to limit the scope of the class, the district court refused to reconsider its July 29, 1982 Order or to limit the class in any way.

The case was bifurcated and the liability portion was tried on a "disparate treatment" theory in late 1984. In a decision entered on October 10, 1985, the district court ruled that plaintiffs had prevailed on the issues of initial pay, promotions, layoffs and terminations for cause at the East Longview plant, and on initial pay and layoffs at the West Longview plant.

Subsequently, the district court, *sua sponte,* appointed an expert to assist the court in establishing damages. Since it was impossible to determine precisely which class members would have been placed in higher paying positions or would have been laid off at a later date, the district court essentially ordered the expert to make a class-wide comparison between how all whites were treated and how all blacks were treated.

To do this, the court's expert first developed a statistical model using only the white employees. For example, to calculate damages in the category of starting pay, the expert developed a regression model using available background data to "predict" starting pay for the white employees. However, since the available background data only explained about 40 percent of the variation in starting rates among whites, the actual starting rates for some whites were higher than the equation predicted and some were lower than the equation predicted. Therefore, for purposes of computing damages for initial pay, the expert "fixed" the starting pay rate for whites at the mean of all the actual

starting rates for whites. Graphically this process can be demonstrated as follows:

Figure 1. Illustration of Distribution of Differences for White Employees Between Rates Predicted from the Model and Actual Rates. Each x represents the difference between the starting pay rate predicted by the statistical model and each white employee's actual starting pay rate.

The expert's second step was to compare the actual starting pay rates of all the black class members with the rate predicted by the model. When the equation was applied to the class it resulted in a similar distribution. The actual starting pay rates for some blacks exceeded the predicted rate while others were less than predicted. However, there were more blacks below the mean. The following graph illustrates the results when the equation for starting pay was applied to blacks.

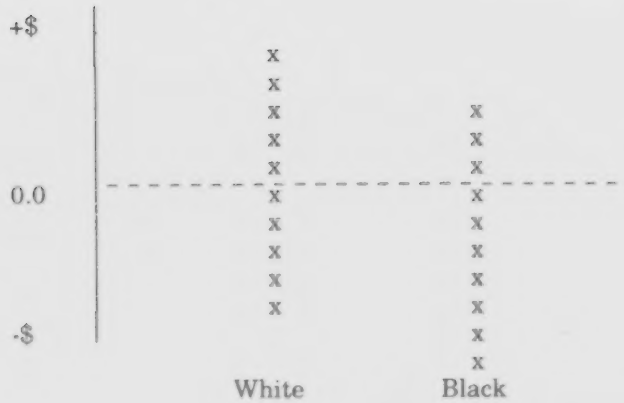

Figure 2. Illustration of Distribution of Differences for White Employees and Black Employees Between Rates Predicted from the Model and Actual Rates

Based on the rationale of such cases as *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974) and *United States v. U.S. Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975) *cert. denied* 429 U.S. 817 (1976), Trinity contended that the differences between the starting pay rates for whites and blacks should be calculated to arrive at the sum that would shift the entire class of blacks upward so that the distribution of starting pay rates for blacks mirrors the actual starting pay rates for whites. The following figure illustrates the adjustment that would result from this process:

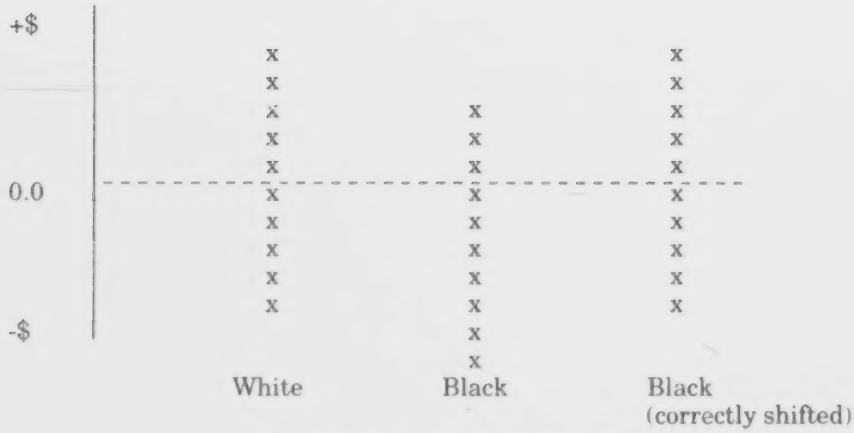

Figure 3. Illustration of Correctly Shifted Distribution of Differences Between Rates Predicted from the Model and Actual Rates for Black Employees

However, rather than calculating damages on a pro rata basis the district court ordered a radically different method that (1) excluded some members of the class from *any* award and (2) granted a windfall to others. The district court ordered that all class members whose starting rates were less than the mean white predicted rate would receive the full amount of the difference. And those class members whose rate exceeded the mean white predicted rate would receive nothing.

Thus, every class member whose "residual" fell below the white mean, was raised to that mean. But the class members whose residual was above the mean were not awarded anything. The district court's method is demonstrated by the following figure:

Figure 4. Distribution of Differences for White Employees and Black Employees Between Rates Predicted from the Model and Actual Rates with the Adjustments Ordered by the Court

The effect of the district court's method of calculating damages can be further demonstrated by the following specific example. Assume that five white employees had starting rates of $9.00, $8.00, $7.00, $6.00 and $5.00. Assume the five black class members had beginning rates of $8.00, $7.00, $6.00, $5.00 and $4.00. Under the method of computation employed in this case, the black class members starting at $8.00 and $7.00 would receive nothing because they were above the mean. However the next three blacks would receive $1.00, $2.00 and $3.00 respectively. After the damage awards were made, if the two groups were compared, the whites would be compensated a total of $35.00 ($9.00 + $8.00 + $7.00 + $6.00 + $5.00) while the class members would be compensated a total of $36.00 ($8.00 + $7.00 + $7.00 + $7.00 + $7.00). Thus, under the district court's "formula" the class as a whole ends up being treated better than the similarly situated whites, but within the class some are overcompensated and some are denied any recovery at all. This same distortion results when the district court's formula is used to calculate damages for starting pay

and promotions at the East Longview plant and for layoffs at both the East Longview and West Longview plants.

On appeal, daunted by the size of the record in the case, the Fifth Circuit panel simply affirmed the district court even though the district court's decision was directly contrary to Fifth Circuit and Supreme Court precedent. The panel held that the district court had not abused its discretion in certifying an across-the-board class action, and that the district court's method of calculating damages was not clearly erroneous. 987 F.2d at 316-317.

Since the panel's decision was directly contrary to the Fifth Circuit's own precedent in cases such as *Vuyanich v. Republic National Bank, Pettway v. American Case Iron Pipe Co.* and *United States v. U.S. Steel Corp.*, Trinity petitioned for rehearing and suggested rehearing *en banc*. Trinity's petition and suggestion was denied on June 22, 1993, and the company now petitions this Court to grant certiorari.

REASONS THE WRIT SHOULD BE GRANTED

The first reason certiorari should be granted is to resolve the conflict between the panel's decision in this case and the decisions of the Supreme Court and other United States Courts of Appeals on the continuing viability of across-the-board class actions in Title VII cases.

In *General Telephone Co. v. Falcon* this Court held that an allegation of discrimination "neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified." 457 U.S. at 157. The Court observed that "the error inherent in the across-the-board rule is the failure to evaluate carefully the legitimacy of the plaintiff's plea that he is a proper class representative under Rule 23(a)." 457 U.S. at 160.

Under Rule 23(a) the class claims must be limited "to those fairly encompassed by the named plaintiff's claims." 457 U.S. at 156.

Other Circuits have interpreted *Falcon* to end the practice of across-the-board class actions. *Eg. Washington v. Brown & Williamson Tobacco Corporation,* 959 F.2d 1566, 1569 (11th Cir. 1992), *Holsey v. Armour & Company,* 743 F.2d 199, 216 (4th Cir. 1984) *cert. denied,* 470 U.S. 1028 (1985). The Fifth Circuit panel in this case, however, affirmed certification of an across-the-board class action. Trinity submits there is therefore a need for the Court to grant certiorari and to explain fully its holding in *General Telephone Co. v. Falcon.* The Court should explain that a plaintiff cannot meet the requirements of Rule 23(a), and that it is inherent error to certify an across-the-board class action in a disparate treatment case, where the employment decisions affecting the plaintiff were made by different supervisors at a different plant than the decisions affecting the other purported class members. Specifically, the Court should hold that the district court erred in certifying a class that included employees at the West Longview plant because the employment and personnel decisions at the West Longview plant were made independently by different supervisors than at the East Longview plant.

The Court has already suggested this is the proper rule in *Bazemore v. Friday,* 478 U.S. 385, 106 S. Ct. 3000, 92 L.Ed.2d 315 (1986). In *Bazemore,* employees of the North Carolina Agricultural Extension Service brought a Title VII action against all the counties in North Carolina alleging discrimination in pay. Plaintiffs sought to certify a defendant class of all the counties in North Carolina. The district court and the Fourth Circuit refused to certify such a broad class. On certiorari this Court agreed that it was improper to certify a class of all counties in North Carolina

because salary decisions were made independently by commissioners in each county. 478 U.S. at 406.

Several of the Courts of Appeals have already applied this principle in Title VII actions and held that the class should be limited to the same management unit that made the personnel decisions that affected the plaintiff class representative. *See e.g. Holsey v. Armour & Co.*, 743 F.2d at 216 (court is "unable to affirm single class treatment for both promotions and hiring claims because the district court made no finding that the supervisors who made the challenged promotions decisions were the same persons who made the hiring decisions . . . . [T]he significant proof for single class treatment required by *Falcon* is lacking in this case."), *Giles v. Ireland,* 742 F.2d 1366, 1371 (11th Cir. 1984) (class limited to blacks in specific work group), *Meadows v. Ford Motor Company,* 510 F.2d 939, 949 (6th Cir. 1975) (affirming limitation of class to plant where plaintiff worked), *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 270 (10th Cir. 1975) (class limited to employees at frozen food warehouse where plaintiff worked).

The panel disregarded this principle here. Instead, the panel held that the district court had not abused its discretion in including the West Longview plant in the class because the East Longview plant and the West Longview plant both participated in Trinity's group insurance and retirement programs, used Trinity's corporate forms and used Trinity's corporate employee handbook, and because the supervisors at the two plants -- although admittedly different — used the same "subjective" criteria (*e.g.* performance, versatility, attitude) in making employment and personnel decisions. Trinity submits that this reasoning is unsound on its face. Subjective criteria necessarily play a part in *all* employment decisions. If the use of subjective criteria alone justified certification of an across-the-board

class action then there would be no need for the careful evaluation of the requirements of Rule 23(a) required by this Court in *Falcon*. In addition, certification of an across-the-board class action based on use of subjective criteria is unfair where the allegedly subjective personnel decisions were made by different supervisors. Since, in a disparate *treatment* case, intent is an element of proof, it is unfair to infer that one supervisor at one plant has intentionally discriminated based on subjective decisions made by another supervisor at another plant.

The panel's reasoning that certification of a broad class was justified because the employees at the two plants participated in Trinity group benefit programs is also unsound where the allegations of discrimination do not relate to the group benefit programs themselves. Participation in the same group benefit program has no bearing on whether the employment discrimination claims of the class relating to pay or layoffs are "fairly encompassed by [Shipes'] claims." *Falcon* at 156. Mere participation in a company-wide group insurance program does not, under the circumstances in this case, justify certification of a class beyond the facility where the class representative is employed. The panel's holding flies in the face of *General Telephone Co. v. Falcon*. The Court should therefore grant certiorari in order to clarify and elaborate on the principles announced in *Falcon* as they relate to employers with more than one facility.

The second reason the Court should grant certiorari is to establish the proper method for determining damages for back pay in a Title VII case. Prior to this case the Fifth Circuit had applied the "rightful place" theory whereby class members were awarded back pay sufficient to put them where they would have been but for the discrimination. *See e.g. Pettway v. American Cast Iron Pipe Co.*, 494 F.2d at 252-253. In this case, however, the back pay award upheld

by the panel does not put the class members where they would have been but for the discrimination. As explained above, the award grants some class members a windfall and completely excludes other class members from any award. Moreover, the formula upheld by the panel unfairly punishes Trinity by awarding more back pay than necessary to put the blacks where they would have been but for the discrimination and results in the class substantially outearning the whites.

In *United States v. U.S. Steel Corporation,* the Fifth Circuit had previously held that there is a *presumption* that all class members will share in any back pay award, and a class member may only be excluded from an award upon a showing that he earned more than or at least as much as comparable whites. 520 F.2d at 1054-1055. The Fifth Circuit specifically commended the use of pro rata shares in calculating back pay awards. 520 F.2d at 1055-1056. The Fifth Circuit's decision in *U.S. Steel Corporation* was based on the decision in *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 95 S. Ct. 2362, 45 L.Ed.2d 280 (1975) where this Court implicitly held there was a presumption that all class members will share in any back pay award. *Albermarle Paper Co. v. Moody* held that the *purpose* of Title VII is to make persons whole for injuries suffered through past discrimination and that back pay is necessary to fulfill that purpose. 422 U.S. at 421. Therefore, the court stated, a district court should generally award back pay and if it declines to do so, should "carefully articulate its reasons." *Id.* at n. 14.

In this case, both the district court and the Fifth Circuit panel disregarded *Albermarle Paper Co.* and *U.S. Steel Corporation.* The district court gave no explanation for excluding from any award those class members whose actual starting rates exceeded the predicted rate. The district court totally failed to "carefully articulate" its reasons for

denying back pay to some members of the class, as required by *Albermarle Paper Co. v. Moody.* The district court's decision to exclude class members from the award was upheld by the panel on the assumption that any black treated better than the *average* white could not have been discriminated against. The panel ignored the factual determination that must be satisfied to overcome the presumption for back-pay which arises in favor of each class member. By upholding the district court's decision to exclude class members from the award without the factual determination required by *Albermarle Paper Co.* and *U.S. Steel Corporation* the panel effectively confers almost unlimited discretion on the district court in determining back pay awards.

This Court should therefore grant certiorari, and upon review should clarify that a formula that overcompensates some class members and excludes others should not be used. The Court should further specify that the correct method for calculating back pay in a Title VII case is to include *all* class members in the damage calculation and then to distribute the shares *pro rata.* Indeed, the Fifth Circuit previously suggested this method in *Pettway,* 494 F.2d at 263 n. 154 and numerous other courts have ordered this type of relief in similar cases. *See e.g. Pitre v. Western Electric Co.,* 843 F.2d 1262, 1274, 1279 (10th Cir. 1988) ("distribute [the differences] pro rata"); *Domingo v. New England Fish Co.,* 727 F.2d 1429, 1444 (9th Cir.) *modified on other grounds* 742 F.2d 520 (9th Cir. 1984); *Ingram v. Madison Square Garden Center,* 709 F.2d 807, 812 (2d Cir.) *cert denied* 464 U.S. 937 (1983); ("fairer procedure, we believe, would be to compute a gross award for all injured class members and divide it among them on a pro rata basis"); *Thompson v. Boyle,* 499 F.Supp. 1147, 1170, 1178-79 (D.D.C. 1980, *aff'd in relevant part sub nom. Thompson v. Sawyer,* 678 F.2d 257, 268 (D.C. Cir. 1982).

CONCLUSION

This Court should grant certiorari in order to clarify when a district court may certify an across-the-board class action in a Title VII suit. Guidance from this Court is also needed on how back pay awards should be calculated and when it is appropriate to exclude class members from such an award. The Court has not addressed these issues since *Albermarle Paper Co. v. Moody* and *General Telephone Co. v. Falcon.* Petitioner therefore prays that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Robert E. Rader, Jr.

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CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Writ of Certiorari was mailed to all counsel of record this 15 day of September, 1993.

Robert E Rader Jr

Robert E. Rader, Jr.

Forest Henry SHIPES, on behalf of himself
and others similarly situated,
et al., *Plaintiffs-Appellees,*

v.

TRINITY INDUSTRIES, A Corporation, *Defendant,*
Robert E. Rader, Jr., *Appellant.*

Forest Henry SHIPES, et al.,
Plaintiffs-Appellees,

v.

TRINITY INDUSTRIES, *Defendant-Appellant.**

Nos. 85-2767, 91-4961.

United States Court of Appeals,
Fifth Circuit.

April 5, 1993.

Appeals from the United States District Court for the Eastern District of Texas.

Before WISDOM, JOLLY and DeMOSS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Forest Henry Shipes, a black male, was employed by Trinity Industries. After he was laid off, Shipes filed suit against Trinity under, *inter alia,* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Shipes alleged that Trinity's all-white supervisory force had discriminated against him in decisions concerning his job placement, promotions, and lay-off. The district court certified a class that included all black hourly employees at two of Trinity's plants. The trial was bifurcated, and after the trial on liability Trinity was found to have intentionally discriminated against black hourly employees in initial hiring, promotions, terminations, and lay offs. The district court then appointed an expert who determined damages to individual class members. After an award of attorneys' fees to Shipes in the amount of $308,238.05, judgment was entered. Trinity appeals. Still further, Trinity's trial counsel appeals the district court's imposition of personal sanctions against him pursuant to Fed.R.Civ.P. 37(b) in the amount of $3,000.00.

*On motion of plaintiffs-appellees and by order of this court, Shipes's cross-appeal was severed on March 12, 1993.

I.

Trinity Industries manufactures railcars and structural steel products. Trinity operates over thirty production facilities in thirteen states, including two plants in Longview, Texas. Shipes was employed by Trinity at its plant in East Longview as a welder's helper from October 23, 1979, until he was laid off on June 30, 1980.

On December 16, 1980, Shipes filed suit against Trinity under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Shipes alleged that Trinity's all-white supervisory force had discriminated against him personally in decisions concerning his job placement, promotions, and layoff. In addition, the district court permitted Shipes to maintain a class action that included all black hourly workers employed at both of Trinity's plants in Longview, Texas, between January 10, 1980, to April 1, 1984.

The district court bifurcated the trial, and the liability portion was tried in 1984.[1] On October 10, 1985, the district court determined that Trinity intentionally discriminated against plaintiff class members in initial placement and pay and in layoffs at both Longview plants; intentionally discriminated against plaintiff class members in promotions and terminations at the plant in East Longview; and had discriminated against Shipes individually in initial placement and pay, promotions, and layoff. The district court then, *sua sponte*, appointed an expert to determine damages.

On December 6, 1991, the expert submitted a model for damages, and on January 22, 1992, the district court entered partial final judgment and ordered that each class member have and recover from Trinity the amount determined by the court-appointed expert. Trinity had urged the district court to order class-wide relief, but instead the district court instructed the expert to determine damages on an individual-by-individual basis. The district court

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[1]During the course of discovery, the district court imposed personal sanctions against Trinity's trial counsel, Robert Rader, Jr. Rader's appeal of these sanctions has been consolidated with this appeal.

subsequently awarded Shipes $308,238.05 in attorneys' fees. Trinity appeals, and Trinity's trial counsel appeals the imposition of personal sanctions.

II.

On appeal, Trinity challenges class certification, the computation of the back pay award, and the determination of attorneys' fees.[2] Trinity first appeals the district court's certification of a class, arguing that Shipes should not have been allowed to represent blacks employed at a different plant from the plant at which he worked. Second, Trinity appeals the district court's method of calculating the back pay remedy. Trinity argues that the district court erred in determining back pay awards on an individual-by-individual basis. Trinity contends that the district court should have ordered class-wide monetary relief—that is, it should have awarded each and every plaintiff class member his *pro rata* share of a pre-determined total monetary award. Third, Trinity appeals the district court's determination of attorneys' fees, arguing that the district court double counted factors and relied on erroneous considerations in enhancing the award.

On the other hand, Shipes first argues that the district court did not err in class certification. Shipes also argues that the district court did not err in formulating the back pay remedy. Furthermore, Shipes argues that the district court correctly calculated the lodestar amount of attorneys' fees and properly enhanced this amount.

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[2]Trinity also argues on appeal that the district court erred by not including voluntary resignations in its analysis of discrimination in layoffs. Trinity itself originally excluded from its layoff analysis those employees who had resigned. Its analysis, however, showed that a statistically significant higher number of black employees than whites had been laid off. Thus, Trinity then revised its study and included those employees who had resigned. Trinity, however, presented no evidence of actual employee motivation in resigning. Furthermore, Shipes's analysis still showed an unfavorable result to black employees even when employees who had resigned were included in the statistical data. The district court found Trinity's proposal to include employees who had resigned in its analysis of discrimination in layoffs unsupported and illogical; we find no reversible error in the district court's decision.

In a consolidated action, Trinity's trial counsel, Robert Rader, Jr., contends that the district court abused its discretion by imposing personal sanctions against him in the amount of $3,000.00. Shipes argues that the sanctions were warranted because of Rader's failure to comply with discovery requests.

III

[1-3] We first address Trinity's argument that the district court should not have certified a class that included employees not only at the plant where Shipes was employed, but also employees at an additional plant. The district court's certification of a class is reviewed under the abuse of discretion standard. *Merrill v. Southern Methodist Univ.*, 806 F.2d 600, 607 (5th Cir.1986). Furthermore, the district court has wide discretion in deciding whether to certify a proposed class. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 471-72 (5th Cir.1986).

[4, 5] Trinity argues that Shipes failed to satisfy the commonality and typicality requirements of Fed.R.Civ.P. 23(a), and thus it was an abuse of discretion for the district court to certify a class.[3] The district court determined that the two plants Trinity operated in Longview utilized the same subjective criteria in making personnel decisions; white supervisors at both plants applied the subjective criteria; employees were transferred between the two plants; the two plants had the same insurance plan, retirement programs, and administrative forms; and the two plants used the same Hourly Employee Handbook. The threshold requirements of commonality and typicality are not high; Rule 23(a) requires only that resolution of the common questions affect all or a substantial number of the class members. *Jenkins*, 782 F.2d at 472. Allegations of similar discriminatory employment practices, such as the use of entirely subjective

[3]Rule 23(a) provides that one or more members of a class may sue on behalf of all if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

personnel processes that operate to discriminate, satisfy the commonality and typicality requirements of Rule 23(a). *Carpenter v. Stephens F. Austin State Univ.*, 706 F.2d 608, 617 (5th Cir.1983). The district court clearly did not abuse its discretion in certifying the class.

IV

A

[6, 7] We next turn to Trinity's argument relating to damages. The district court's calculation of a back pay award is reviewed under the clearly erroneous standard. *Pegues v. Mississippi State Employment Serv.*, 899 F.2d 1449, 1455 (5th Cir.1990). At the outset, we observe that fashioning a class-wide back pay award is exceedingly complex and difficult, and the process is fraught with uncertainty. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir.1974). Two general premises apply to the computation of a back pay award: (1) unrealistic exactitude is not required, and (2) uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer. *Claiborne v. Illinois Cent. R.R.*, 583 F.2d 143, 149 (5th Cir.1978), *cert. denied*, 442 U.S. 934, 99 S.Ct. 2869, 61 L.Ed.2d 803 (1979). Furthermore, the district court must be granted wide discretion in resolving ambiguities. *United States v. United States Steel Corp.*, 520 F.2d 1043, 1050 (5th Cir.1975), *cert. denied*, 429 U.S. 817, 97 S.Ct. 61, 50 L.Ed.2d 77 (1976).

B

The district court ordered that back pay be determined on an individualized basis. The district court ordered that only each class member, whose beginning pay rate at the time he started working for Trinity was below the average beginning rate for white employees with the same qualifications, should receive a back pay award; the award raised the hourly rate of such individual class member by the difference between his beginning rate and the average white beginning rate. Trinity argues that this back pay remedy violates the fundamental rules of calculating such an award

because it unfairly excludes some class members and grants a windfall to other class members. Trinity argues that the district court should have determined a total sum that represented the difference between black and white beginning rates as a whole, and then divided this amount to all class members on a *pro rata* basis.[4] Trinity argues that such an increase to class members would tend to eliminate the racial characteristics reflected in the distribution of pay rates; in other words, black and white employees in representative numbers would occupy the highest pay rates as well as the middle and lower pay rates.

Trinity also argues—somewhat vaguely—that the district court's formula for determining back pay for premature separation from employment was equally flawed. For premature separation from employment, the district court ordered a comparison between the actual length of service of each class member and the median length of service of white employees hired in the same time period. Each plaintiff class member whose service was less than the median length of service for white employees received an award equal to the difference.[5] Again, Trinity argues that the appropriate remedy is to calculate the total difference in the treatment of the classes and then award each class member his *pro rata* share.

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[4]Under Trinity's proposed method, every class member would receive the same monetary award. In the calculation of the back pay award for initial rate, for example, the average starting rate for white employees as a group would be compared to that of plaintiff class members. Simply illustrated, if five white employees had beginning rates as a group of $5.00, $6.00, $7.00, $8.00, and $9.00, the average would be $7.00. If five class members had beginning rates of $3.00, $4.00, $5.00, $6.00, and $7.00, the average would be $5.00. The total difference in rates between the groups would be $2.00, (the difference in averages) multiplied by 5, the number of class members, or $10.00. This amount, $10.00, would then be distributed *pro rata* to the class members, each class member receiving a back pay award of $2.00, or $10.00 divided by 5. Trinity's method would thus shift the entire group of plaintiff class members upward by that amount.

[5]For example, if the average length of employment for white employees hired during a particular time period was two years, but a black employee hired during this same time period was laid off or terminated after one year, the black employee would be entitled to back pay for one year.

C

On the other hand, Shipes defends the district court's remedy. Shipes argues that the district court's remedy was adopted in order to bring the pay level of each black employee who was paid less than the average salary of white employees with equal qualifications up to the level of that average. Shipes argues that the method proposed by Trinity is not intended to, and does not, compensate *individual* black employees to the extent to which they were underpaid relative to white employees with their qualifications; instead, Trinity's method is concerned only with equalizing the amounts paid to whites and blacks as a group.

Shipes argues that under Trinity's plan, each class member would receive the same increment to his initial pay, regardless of the amount by which he was actually underpaid or regardless of whether he was underpaid at all. Shipes points out that some blacks were hired at rates equal to comparable whites. Thus, there is no basis to find that these black employees were discriminated against. Consequently, Shipes argues that Trinity's proposed *pro rata* award to all black employees would in effect deduct from the wage rate awarded each black employee who was underpaid and, in effect, grant that money as a windfall to non-discriminatees.

D

[8, 9] Let us begin our evaluation of these arguments by observing that a Title VII class action suit imposes on the plaintiff a bifurcated burden of proof. First, the plaintiff must establish invidious class-based treatment; next, he must prove damages caused to class members by that illegal conduct. A finding of racial discrimination against a class "does not necessarily mean that every member of the class is entitled to back pay." *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1375 (5th Cir.1974). Once a *prima facie* case of discrimination against a class is made, a presumption of back pay arises in favor of all class members; this presumption does not, however, *per se* entitle a class member to back pay without some individual clarification. *Pettway*, 494 F.2d at 259. Once it has been determined that

the class has been subjected to unlawful racial discriminatory practices, only those individuals who have suffered a loss of pay because of the illegal discrimination are entitled to compensation. *Johnson,* 491 F.2d at 1376. Title VII does not require a remedy for those not discriminated against. *Gamble v. Birmingham So. R.R. Co.,* 514 F.2d 678, 686 (5th Cir.1975).

[10, 11] The complexity of the case is a determining factor in what method the district court should utilize to formulate a back pay award. *Pettway,* 494 F.2d at 261. If the class is small, the time period short, or if the effect of the discrimination is straightforward, an individual-by-individual determination of what each claimant's position would have been but for the discrimination is possible. *Id.* If, however, the class is large, the promotion or hiring practices are ambiguous, or the illegal practices continued over an extended period of time, a class-wide approach to the measure of back pay may be necessitated. *Id.* The process of computation is not, however, an "either, or" approach, and the determination of a back pay model is not a choice between one approach more precise than another. *Id.* at 261 n. 151.

[12] Methods for determining back pay possessed of superior certainty, such as the approach adopted by the district court, should be exhausted before resorting to racially drawn class-wide comparisons or *pro rata* approaches. *United States v. Steel Corp.,* 520 F.2d at 1055. The fact that a class is large does not mean that *pro rata* relief should automatically be ordered. As noted earlier, not all members of a class are automatically entitled to back pay and there should be, if possible, a determination on an individual basis as to which class members are entitled to damages and the amount of such recovery. *Johnson,* 491 F.2d at 1375.

E

[13] To reverse the district court, we would have to conclude that its calculations of back pay were clearly erroneous. On December 27, 1990, the district court entered an order that established the guidelines that the

court-appointed expert was to follow in constructing the final model for back pay damages. With respect to discrimination occurring in wage rates upon initial hiring, the district court ordered that back pay be awarded to particular class members based on the difference between the average starting wage paid to white employees with the class member's qualifications and the actual starting wage paid to such class member.

On July 29, 1991, the district court entered a second order relating to damage calculations. In this order, the district court addressed Trinity's concern that calculations for the class should be determined as a total sum, and then damages awarded to each class member on a *pro rata* basis. The district court stated that Trinity's proposal rested on the assumption that a class-wide finding of discrimination implies that each class member was affected equally by the discrimination and therefore damages should be determined by comparing the class of white employees with the class of black employees. The district court, however, expressly rejected this argument, stating that Trinity's proposed method of awarding damages was inappropriate. Specifically, the district court stated that although Trinity was found liable for discrimination against the plaintiff class generally, it could not be assumed that such discrimination was uniformly felt by all class members.

The back pay model adopted by the district court has two sections. First, for back pay remedying discrimination in initial starting salary, each individual class member was compared to white employees who had the same educational background and work experience. If a class member was paid a starting rate below the average starting rate of white employees with the same qualifications, the class member was awarded that difference as back pay. Second, for back pay in premature separation from employment, each individual class member was compared to white employees who were hired in the same time period. An average length of employment for these white employees was determined. If a class member was laid off or terminated before the average length of employment for the group of

comparable white employees, he was awarded the difference as back pay.

[14] Under the back pay formula relating to initial pay rates, those individual class members who were paid starting rates above the average starting rates of white employees with the same qualifications received no back pay award. Similarly, those individual class members who were not laid off or terminated prior to the average length of employment for white employees hired in the same time period received no back pay award. A Title VII plaintiff, however, is not entitled to recover an amount greater than his pecuniary loss. *Pegues,* 899 F.2d at 1457. Because these class members did not suffer pecuniary losses as a result of Trinity's discrimination, it follows that they are not entitled to an award of back pay. After carefully reviewing the record and the back pay remedy ordered by the district court, it is our opinion that the remedy ordered was not clearly erroneous. The district court's back pay remedy is therefore affirmed.

V

A

[15, 16] We now address Trinity's argument concerning the attorneys' fees awarded to Shipes. The district court's determination of attorney's fees is reviewed for abuse of discretion, and the findings of fact supporting the award are reviewed for clear error. *Von Clark v. Butler,* 916 F.2d 255, 258 (5th Cir.1990). As the first step in determining the amount of attorneys' fees to award, the district court must determine the compensable hours from the attorneys' time records, including only hours reasonably spent. *Alberti v. Klevenhagen,* 896 F.2d 927, 930 (5th Cir.), *vacated in part,* 908 F.2d 352 (5th Cir.1990). As a second step, the district court must select an appropriate hourly rate based on prevailing community standards for attorneys of similar experience in similar cases. *Id.* The number of compensable hours is then multiplied by the selected hourly rate to produce the "lodestar" amount.

[17] Shipes sought recovery of attorneys' fees for 1,306.88 hours of time at a rate of $175.00 per hour for lead counsel

and $150.00 per hour for associate counsel. The district court, after determining beyond doubt that the plaintiffs had indeed prevailed on the central issue of the lawsuit and were thus prevailing parties, ordered payment of 100% of the time requested at a rate of $165.00 per hour for lead counsel and $140.00 per hour for associate counsel, for a total fee award of $144,712.70. The district court stated that only four of the *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir.1974), factors were subsumed in the lodestar amount: (1) time and labor required; (2) customary fee; (3) counsel's experience and ability; and (4) awards in similar cases.[6] After determining that the hours accurately reflected the time expended in this action, the district court further determined that the rates proffered by Trinity were too low, but that Shipes's attorney had failed to show that attorneys with abilities comparable with her actually received $175.00 per hour. For this reason, the district court ordered payment at the hourly rate of $165.00, which represented the amount recently applied by the district court for work performed by lead counsel in employment discrimination cases.

The district court did not err in its calculation of the lodestar amount. The district court reviewed the attorneys' time records and found them to be more than adequate. The district court did not simply accept the hourly rate suggested by Shipes's attorneys, but instead lowered it to an hourly rate that had been applied in the community for similar cases. The district court further ordered that the hourly rates for the attorneys be reduced for the time the attorneys spent traveling. We find that the district court did not err in its determination of the lodestar amount of $144,712.70.

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[6]The twelve *Johnson* factors are (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorney due to this case; (5) the customary fee; (6) whether fee is fixed or contingent; (7) time limitations; (8) the amount involved and results obtained; (9) the experience, reputation, and ability of counsel; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson v. Georgia Highway Express,* 488 F.2d 714, 717-19 (5th Cir.1974).

B

[18, 19] After determining the lodestar amount, the district court may adjust the lodestar up or down in accordance for relevant *Johnson* factors not already included in the lodestar. After calculating the lodestar amount, the district court must then apply the remaining *Johnson* factors to determine if the lodestar should be adjusted; the district court must be careful, however, not to double count a *Johnson* factor already considered in calculating the lodestar when it determines the necessary adjustments. *Von Clark*, 916 F.2d at 258. Furthermore, the district court must explain with a reasonable degree of specificity the findings and reasons upon which the award is based, including an indication of how each of the *Johnson* factors was applied. *Id.* Four of the *Johnson* factors—the novelty and complexity of the issues, the special skill and experience of counsel, the quality of representation, and the results obtained from the litigation—are presumably fully reflected in the lodestar amount. *Alberti*, 896 F.2d at 930. Although upward adjustments of the lodestar figure based on these factors are still permissible, such modifications are proper only in certain rare and exceptional cases supported by both specific evidence on the record and detailed findings by the lower courts. *Id.*

After calculating the lodestar amount, the district court enhanced the fee on five additional *Johnson* factors. First, the district court determined that the lodestar amount should be enhanced for the novelty and difficulty of the case, stating that this action involved representation of over three hundred employees at two manufacturing plants, challenged the entire spectrum of Trinity's employment decisions, and involved complex, highly technical data. Second, the district court enhanced the lodestar amount based on the skill required, stating that Shipes's claim necessitated extensive analysis, which Shipes's counsel competently presented. Third, the district court enhanced the lodestar amount for the preclusion of other employment, stating that Shipes's counsel's total time commitment to this case for several months adequately demonstrated that this case was inordinately time-consuming and precluded

the acceptance of other requests for representation. Fourth, the district court enhanced the lodestar amount based on special time limits imposed, stating that Shipes's counsel's claim of nearly total time commitment before trial supported an upward fee adjustment because of the exceptional skill needed to present the last-minute data in an intelligible manner. Fifth, the district court enhanced the lodestar amount based on the amount of money involved and the obtained, stating that the outcome of this lawsuit represented a tremendous victory based upon the large number of claimants and the probable enormity of the relief.[7] On December 7, 1987, the district court ordered an 80% enhancement of the lodestar award based on these five *Johnson* factors, increasing the attorneys' fee award from $144,112.70 to $260,482.86. 685 F.Supp. 607.

C

[20] We find that four of these five *Johnson* factors used by the district court to enhance the lodestar amount—the novelty and difficulty of the case, the skill required, special time limits imposed, and preclusion of other employment—are supported, and thus enhancement based on these factors was unwarranted. We do think, however, that enhancement due to the results obtained may be warranted.

[21] The district court enhanced the lodestar amount based on the novelty and difficulty of the case because it found that there were over three hundred plaintiffs, an entire spectrum of employment decisions was being challenged, the case was complex and highly technical, and Trinity's obstinate conduct caused additional difficulty. These factors—not uncommon in much present-day litigation—simply do not render a case "rare" or "exceptional" for purposes of enhancing the lodestar amount. All counsel competent to handle a case such as this one are expected to be able to deal with complex and technical matters; this expertise is reflected in their regular hourly rate, based on

[7]The district court further determined that enhancement should not be granted for two remaining *Johnson* factors: the undesirability of the case and the nature and length of professional relationship with the client.

fees for counsel of similar experience and ability. Still further, the difficulty in the handling of the case is adequately reflected in the number of hours billed—hours for which the attorney is compensated in the lodestar amount. Similarly, obstinate conduct by opposite counsel is compensated by the additional number of hours that are required to prevail over such obstinacy.

[22] The district court's enhancement based on two other factors—the skill required and special time limits imposed—was, we think, also unwarranted as each is accounted for in the lodestar amount. Even though Shipes's counsel presented extensive statistical data with competence, nothing less should be expected of counsel; consequently, this factor alone does not support enhancement. We also find as an unwarranted basis for enhancement "special time limits imposed" by the defendant's necessitating that Shipes's attorney evaluate last-minute data shortly before trial. Again, we emphasize that this factor is not an abnormal occurrence—especially in a trial involving statistics and complex data—and is accounted for by the additionally required hours that are reflected in the lodestar.

[23] We also conclude that the district court improperly enhanced the lodestar based on the preclusion of other employment. The district court found that Shipes's counsel was totally committed to this case for several months prior to trial and concluded that this demonstrated that counsel was precluded from accepting other requests for representation. The district court did not make a finding that Shipes's attorney had indeed been required to refuse other employment because of this case, and enhancement based on this factor is therefore unsupported. Furthermore, this factor will ordinarily be subsumed within the lodestar amount: If, for example, Shipes's attorney worked on nothing but this case, then this potential loss of income in refusing other employment is compensated for in the number of hours she billed in the instant case.[8]

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[8]We also note that the complaint in this case was filed on December 16, 1980, the trial began on November 19, 1984, and partial final judgment on liability was entered on October 10, 1985; for this extended period of

We do think, however, that the district court may have been warranted in enhancing the lodestar amount because of the amount involved and results obtained.[9] Shipes's victory was complete on all issues. Furthermore, the victory resulted in a substantial award of monetary damages for class members—plus, and very importantly, future protection against discrimination in the form of injunctive relief. For these reasons, enhancement of the lodestar amount on account of the results obtained may have been warranted. On remand, the district court must determine whether it is customary in the area for attorneys to charge an additional fee above their hourly rates for an exceptional result after lengthy and protracted litigation. If Shipes's attorneys can demonstrate this area custom, the district court will be warranted in enhancing the lodestar in an appropriate amount based on this factor.

D

[24] On August 4, 1988, the district court ordered an additional 33% enhancement of the lodestar amount based on the risk of not prevailing, or the contingent nature of the case. The district court found that the clear improbability of plaintiffs' ability to find counsel to represent them in similar actions within the district warranted the contingency enhancement.

In *Islamic Center of Mississippi v. Starkville,* 876 F.2d 465 (5th Cir.1989), this court adopted the approach to enhancement for the contingent nature of the case set forth in Justice O'Connor's concurrence in *Pennsylvania v. Delaware Valley Citizens' Council (Delaware Valley II),* 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987). In *City of*

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time, however, Shipes's attorneys sought fees for only 1,306.88 hours. Certainly during this time period Shipes's attorneys were not precluded from accepting other employment because of this case.

[9]As we stated earlier, this factor is presumably reflected in the lodestar amount and enhancement based on results obtained is proper only in rare and exceptional cases supported by specific evidence and detailed findings by the district court. *See Alberti,* 896 F.2d at 930. On remand the district court should take cognizance of this requirement in deciding whether to enhance the lodestar amount based upon the results obtained.

Burlington v. Dague, ___ U.S. ___, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992), however, the Supreme Court rejected Justice O'Connor's approach. In *Burlington*, the Court first noted that, "[a]lthough different fee-shifting statutes are involved, the question is essentially identical" to the question it had addressed, but which it had not resolved in *Delaware Valley II:* whether a court may enhance the fee award above the lodestar amount in order to reflect the fact that the party's attorneys were retained on a contingent-fee basis and thus assumed the risk of receiving no payment at all. In *Burlington*, the Court was urged to adopt the approach set forth by Justice O'Connor in *Delaware Valley II*. The Court expressly declined to do so, however, stating that "we do not see how it can intelligibly be applied." *Burlington*, ___ U.S. at ___, 112 S.Ct. at 2642. The Court instead adopted the approach reflected in Justice White's plurality opinion in *Delaware Valley II* and held that enhancement for contingency was not permitted under the fee-shifting provisions of the Solid Waste Disposal Act and the Clean Water Act. *Burlington*, ___ U.S. at ___, 112 S.Ct. at 2643-44.

Thus, Burlington eviscerates our holding in *Islamic Center* in which we stated that Justice O'Connor's position was "the only view to which a majority of the [Supreme] Court, and perhaps even the whole [Supreme] Court could subscribe." *Islamic Center*, 876 F.2d at 471. *Burlington* now tells us, however, how wrong we were. Accepting the error of previous thinking, and following the clearly lighted path of *Burlington*, we now hold that the contingent nature of the case cannot serve as a basis for enhancement of attorneys' fees awarded to prevailing plaintiffs under traditional fee-shifting provisions. Accordingly, it was error for the district court to enhance the lodestar amount by 33% based on this factor.

E

In summary, we conclude that the district court correctly calculated the lodestar amount to be $144,112.70. We also conclude that one of the enhancement factors applied by the district court—the results obtained—may have been

warranted; we therefore remand this issue to the district court for a determination of whether this factor is supported by custom in the legal community and, if so, the appropriate amount.

VI.

[25, 26] We now turn to the issue of sanctions which were accessed against Trinity's trial counsel, Robert Rader, Jr., pursuant to Rule 37(b), the appeal of which has been consolidated with this action. The imposition of sanctions is a matter of discretion for the district court; we review only for abuse. *Frame v. S-H, Inc.*, 967 F.2d 194, 202 (5th Cir.1992). We hold that the district court did not abuse its discretion in sanctioning Rader.

In its order of March 5, 1984, the district court noted that Trinity had been recalcitrant in relation to the discovery sought by Shipes. As early as November 24, 1981, the district court observed that Trinity's entire posture was infected with a tone of indifference and disrespect for clearly established rules of procedure. The district court warned that such lassitude would not be countenanced. On February 12, 1982, the district court stated that the recurring nature of Trinity's indifference to time limits substantially limited the credibility of Trinity's protestations of good faith. The district court further stated that Trinity's objection to and failure to answer two interrogatories directly violated an earlier court order; the district court cautioned that Trinity's failure to answer was tantamount to contempt of court. In 1982, the district court also noted that Trinity continued to adhere to its posture of disobedience to court orders and again warned that this attitude would not be countenanced further. At this point, the district court cautioned Rader that Rule 37(b) prescribed harsh actions against parties who failed to comply with orders concerning discovery.

Notwithstanding these warnings, still Shipes had to file numerous other motions to compel, which the district court granted. The district court held a hearing on March 16, 1984, to allow Rader to appear to show cause why he should

not be sanctioned. After the hearing, the district court concluded that there had been a deliberate effort by Rader to delay discovery. The district court did not, however, impose any sanctions at that time, but stated that it did not expect to be presented with any additional problems concerning discovery. After the hearing, Shipes was given the information to which Rader had referred. Then, however, on March 20, 1984, Shipes filed yet another motion for sanctions. At this time, the district court awarded sanctions. The court found that the information given to Shipes by Rader after the earlier hearing did not represent most of the outstanding discovery and that Rader had been disingenuous in his representations to the court that he had complied with the court's orders.

[27, 28] The district court did not abuse its discretion in sanctioning Rader. On the contrary, the district court gave Rader several warnings and on numerous occasions cautioned Rader to comply with discovery requests. The court did not err in concluding that Rader had failed to heed its warnings and had failed to comply in good faith. Neither did the court err as to the amount of $3,000.00. Under Rule 37(b), Rader may be personally liable for reasonable expenses, including attorneys' fees, caused by his failure to comply with a discovery order. *Batson v. Neal Spelce Assoc. Inc.*, 765 F.2d 511, 516 (5th Cir.1985). The affidavit presented by Shipes's attorney along with the January 23, 1984 motion for sanctions showed attorneys' fees and expenses in the amount of $1,617.50. On March 16, 1984, Shipes's attorneys had to attend a hearing for Rader to show why he should not be sanctioned, and on March 20, 1984, Shipes's attorneys had to prepare yet another motion for sanctions. It was reasonable for the district court to assume that the expenses and fees involved in the second motion were similar to those incurred in preparing the first motion. We therefore affirm the district court in sanctioning Rader in the amount of $3,000.00.

VII.

For the reasons stated above, we affirm the district court's certification of a class. Furthermore, we affirm the

district court on the issue of damages. We reverse, vacate, and remand, however, on the issue of attorneys' fees; the district court correctly determined the lodestar amount, but enhancement should not have been ordered except possibly on one *Johnson* factor—the results obtained—with respect to which we remand. In addition, we affirm the district court's sanctioning of Trinity's trial counsel. Accordingly, the decision of the district court is

AFFIRMED in part; REVERSED, VACATED, and REMANDED in part.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

NO. TY-80-462-CA

FOREST HENRY SHIPES, et al.,

v.

TRINITY INDUSTRIES, INC.

ORDER

The above-styled civil action is brought as a class action, pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.*, to challenge the allegedly discriminatory employment practices and policies of Trinity Industries, with respect to two of defendant company's plants, hereinafter designated as Longview East and Longview West. The action was originally filed by plaintiff Forest Henry Shipes on December 16, 1980. Plaintiffs have since moved for leave to file an amended complaint, to include Willie McCoy as a named plaintiff. However, plaintiff now states that, since McCoy is a member of the putative class and will be represented in this action by Shipes if the action is certified as a class action, he need not be accorded representative status at this time.

In his complaint, Shipes alleges that defendant company maintains employment practices which discriminate against black employees on the basis of race. Specifically, plaintiff alleges that defendant has discriminated against black employees at its Longview East and Longview West plants with respect to its practices and policies affecting job

assignment, job classification, promotion, pay, layoff, transfer, and discharge. Shipes individually alleges he has been denied equal employment opportunities, by virtue of defendant's job classification, promotion, pay, and layoff practices. He seeks reinstatement and recovery of lost wages for himself. On behalf of the class of black employees, Shipes seeks backpay and other equitable relief.

I.

Plaintiff Shipes was employed at defendant's Longview East plant, as a welder's helper, from September 23, 1979, to June 30, 1980, at which time he was laid off. Shipes filed a complaint with the Equal Opportunity Employment Commission on July 10, 1980, alleging he had been victimized in several respects by the discriminatory employment policies and practices of defendant. The allegations of the complaint were limited to charges of discrimination in employment against plaintiff; the EEOC charge did not contain any class charges or specific assertions that defendant Trinity Industries maintained employment practices which discriminated against black employees as a class.

Prior to the completion of its investigation and before it had the opportunity to make factual findings with respect to Shipes' charge, the EEOC issued to Shipes a "right to sue" letter, whereupon he filed the instant action, as a class action. Defendant now contends that the present action must be dismissed, at least insofar as it includes allegations of class discrimination, because such claims were not presented in the original EEOC charge. Accordingly, defendant contends, the class claims must be dismissed for failure to satisfy the jurisdictional prerequisites of Title VII.

Defendant's contention in this relation relies on the doctrine that allegations contained in a judicial complaint filed under Title VII must be within the "scope of the complaint" filed with the EEOC. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466-67 (5th Cir. 1970). The Court of Appeals for the Fifth Circuit has been firm in its insistence that Title VII plaintiffs satisfy the jurisdictional prerequisites of that statute. However, that court has taken a flexible view as to the manner in which those requirements are to be satisfied.

See, e.g., Reeb v. Economic Opportunity Atlanta, 516 F.2d 924 (5th Cir. 1975) (period of limitations); *Gamble v. Birmingham Southern Railroad Co.,* 514 F.2d 678 (5th Cir. 1975) (substantive scope of the complaint). As the court noted in *Sanchez, supra:*

> The basic purposes of Title VII are clearly discernible. Mindful of the remedial and humanitarian underpinnings of Title VII and of the crucial role played by the private litigants in the statutory scheme, courts construing Title VII have been extremely reluctant to allow procedural technicalities to bar claims brought under the Act.

431 F.2d at 460. With specific reference to the adequacy of the EEOC charge as a necessary predicate to subsequent federal civil actions, the court noted:

> We must ever be mindful that the provisions of Title VII were not designed for the sophisticated or the cognoscenti, but to protect equality of opportunity among all employees and prospective employees.

Id. at 463.

The Court of Appeals for the Fifth Circuit has never held that a plaintiff's EEOC charge must contain class allegations before that plaintiff may file a subsequent civil action as a class action. Nor would such a doctrine comport with the Circuit's holdings on related topics, or the "remedial and humanitarian underpinnings of Title VII." In advancing this contention, defendant relies exclusively on a recent district court decision. In *Fellows v. Universal Restaurants, Inc.,* 26 E.P.D. ¶31,973 (N.D. Tex. 1981), the court held:

> There must be some indication of class related unlawful employment practices in the administrative record prior to the institution of a class suit in federal court.

26 E.P.D. at 21,385. In support of this novel conclusion, the court cited *Sanchez v. Standard Brands, Inc., supra, Gamble v. Birmingham Southern Railroad Co., supra,* and *Falcon v. General Telephone Co.,* 626 F.2d 369, *vacated* 450 U.S. 1036 (1981), *reinstated in part without opinion,*

reversed 50 LW 4638 (1982). These decisions do not support the conclusion reached in *Fellows*. Neither the terms, the logic, nor the implications of *Sanchez* and its progeny justify the limitations on judicial relief under Title VII imposed by the court in *Fellows*.

Indeed, the district court decision is contrary to the established law of the Fifth Circuit concerning the sufficiency of an individual EEOC complaint as a jurisdictional predicate for a subsequent Title VII class action. The Court of Appeals for the Fifth Circuit has held, without equivocation, that a class action can be maintained under Title VII, even though only one member of the incipient class has filed a charge of discrimination with the EEOC. *Miller v. International Paper Co.*, 408 F.2d 283 (5th Cir. 1969); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 495 (5th Cir. 1968); *see Sanchez v. Standard Brands, Inc.*, 431 F.2d at 460. In *Sanchez*, the court noted that the doctrine in this relation is consistent with the more general principle of latitude in interpreting the procedural requirements for Title VII litigation. More specifically, the court in *Oatis* noted:

> A [Title VII] suit is . . . private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone, but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.

398 F.2d at 499, quoting *Newman v. Piggie Part Enterprises*, 390 U.S. 400 (1968); *accord Miller v. International Paper Co., supra*, 408 F.2d at 284-85. On the basis of this analysis, the court in *Oatis* evaluated the defendant's contention that an individual employee, after filing an EEOC charge, could not represent, as a class plaintiff, other employees similarly situated who had not filed such charges. The court rejected that limited view, and concluded:

> The better approach would appear to be that once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated.

398 F.2d at 498.

The EEOC charge filed by Shipes contained allegations that the defendant had discriminated against him on the ground of race. The charge did not advance a claim of a single discrete act of discrimination. Rather, Shipes claimed had been victimized by biased treatment at several different stages of his tenure with defendant, including job assignment and pay, in addition to the decision to lay him off in June, 1980. As the court in *Oatis* noted, "racial discrimination is by definition class discrimination." 398 F.2d at 499; *see also General Telephone Co. of the Southwest v. Falcon,* _____ U.S. _____, 50 LW 4638, 4640 (1982) ("We cannot disagree with the proposition . . . that racial discrimination is by definition class discrimination."). This is not to say, of course, that all Title VII actions are, by their nature, class actions. (Indeed, in *General Telephone Co. v. Falcon, supra* (discussed below), the Court explicitly rejected this view.) A class action may only be maintained if the plaintiff is able to satisfy the specific requirements of Rule 23. However, the holdings in *Sanchez, Miller,* and *Oatis* clearly provide that, as a jurisdictional matter, the presence of allegations of racial discrimination in an EEOC charge are sufficient to serve as a predicate for a subsequent class action under Title VII. "To require separate, identical charges before the EEOC, filed against the same employer . . . would tend to frustrate our system of justice and order." *Oatis v. Crown Zellerbach, supra,* 398 F.2d at 499.

II.

Upon a motion for class certification, Rule 23, F.R.CIV.P., requires that a determination be made as to whether the suit is properly maintainable as a class action. For this purpose, a hearing was held on April 28, 1982. On the basis of evidence and argument adduced at that hearing, it has been determined that the instant action may be maintained as a class action within the standards set forth in the Federal Rules of Civil Procedure.

As already noted, this action involves a broad-gauged attack on the employment practices of Trinity Industries, with respect to their two Longview plants. Plaintiff charges that, from the point of initial employment, the policies and practices of defendant with respect to its employees are infected with racial discrimination. Specifically, Shipes contends that black employees at defendant's Longview East and Longview West plant are treated unequally in all respects of their association with Trinity Industries. Among the aspects of differential treatment alleged by plaintiff are, as previously detailed, initial job assignment, subsequent job transfer and promotion decisions, wage scales, layoff decisions, and dismissal determinations.

With the exception of initial employment decisions, which are not questioned in the present action, plaintiff's complaint challenges the full range of employment practices and policies of defendant. Broad actions of this nature, based on contentions of wide-spread employment discrimination, have been labeled "across the board" actions, and have received, on numerous occasions, the imprimatur of the Court of Appeals for the Fifth Circuit. The cornerstone of this doctrine is that court's decision in *Johnson v. Georgia Highway Express,* 417 F.2d 1122 (5th Cir. 1969), which upheld the right of a discharged black employee to litigate a broadly-inclusive action against the employment practices of his former employee, in the form of a class action under Title VII. The plaintiff in *Johnson* was permitted to represent all persons affected by the employer's allegedly discriminatory employment practices, even though the individually named class representative might have been affected by those practices as to only one facet, such as racially motivated discharge, and had not individually experienced other forms of employment discrimination, as, for example, a discriminatory denial of promotion.

The Court of Appeals for the Fifth Circuit has reaffirmed the *Johnson* holding numerous times, most recently in *Phillips v. Joint Legislative Committee,* 637 F.2d 1014, 1024 (5th Cir. 1981). *See also Satterwhite v. City of Greenville,* 578 F.2d 987 (5th Cir. 1978) (*en banc*), *vacated on other grounds,* 445 U.S. 940 (1979). *Phillips* and *Satterwhite*

establish conclusively that the *Johnson* doctrine survived the Supreme Court's decision in *East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395 (1977). In *Rodriguez,* the Supreme Court reversed a decision of the Court of Appeals for the Fifth Circuit certifying a class, on the grounds that the class representative in that case was not a member of the class he sought to represent, and did not possess the same interest and injury as the class. A variety of factors contributed to this holding, and a review of them indicates that *Rodriguez* in no way undermines the legitimacy of "across the board" actions. First, the plaintiffs in Rodriguez did not move for class certification at trial. Second, the evidence and argument adduced at trial was limited to the individual claims of the named plaintiffs. Third, stipulations offered at trial greatly narrowed the range of issues properly presented for adjudication. Fourth, the Court of Appeals had certified the class, after trial, on the basis of a trial record that, in the judgment of the Supreme Court, plainly demonstrated the incapacity of the named plaintiffs adequately to represent the class, as required by Rule 23(a)(4). In view of all these critical limitations on the factual and legal circumstances involved in *Rodriguez,* the adjudication of class claims by the Court of Appeals did not comport with the established procedures for class certification contemplated by the Federal Rules of Civil Procedure.

The factors enumerated here stand as limitations on the applicability of *Rodriguez* to the instant action. Indeed, as previously noted, the Fifth Circuit has made it plain that the Court's holding in *Rodriguez* in no manner compromises the viability of the *Johnson* doctrine. The Court of Appeals has acknowledged the *Rodriguez* holding to the effect that a class representative "must be part of the class and possess the same interest and injury as the class." 431 U.S. at 403, quoting *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 216 (1974). This doctrine is plainly founded on the Constitutional requirements of Article III, generally considered under the rubric of "standing." The "case or controversy" principles of Article III are, of course, applicable to all judicial actions, whether or not they present class allegations. Beyond the threshold

constitutional considerations, the typicality and commonality requirements of Rule 23 serve to satisfy the concern that the individual claims of the class representative be fundamentally related to the claims advanced on behalf of the class as a whole. The Rule 23 standards will be addressed separately, below. With respect to the constitutional criterion, the constraint on class actions set forth in *Rodriguez* has been held to require that a class plaintiff suffer from the alleged discrimination "in some respect" and not that the individual experience precisely the same form of discrimination as other class members. *Satterwhite v. City of Greenville, supra,* 578 F.2d at 993-994 n. 8. In *Payne v. Travenol Laboratories,* 565 F.2d 895 (5th Cir. 1978), *cert. denied* 439 U.S. 835 (1978), the Court of Appeals for the Fifth Circuit held that the named plaintiffs could challenge the discriminatory practices of defendant, although they personally were not subject to any particular aspects of discrimination. "As parties who have allegedly been aggrieved by some of these discriminatory practices, plaintiffs have demonstrated a sufficient nexus to enable them to represent other class members suffering from different practices motivated by the same policies." 565 F.2d at 900.

In its term just completed, the Supreme Court reviewed the maintainability of across the board actions as class actions. In *General Telephone Co. of the Southwest v. Falcon,* _____ U.S. _____, 50 LW 4638 (1982), the Court reversed a lower court order, upheld by the Court of Appeals for the Fifth Circuit, certifying an across the board class action brought by an individual employee on behalf of all employees of defendant company. However, as in *Rodriguez,* the Court's opinion is closely tied to the specific facts of the case, and in no wise constitues a broad disapproval of the *Johnson* doctrine. In *Falcon,* the district court certified a plaintiff class, without holding an evidentiary hearing to determine the adequacy of class representation under the standards of Rule 23. Such a cavalier approach is clearly contrary to the spirit of the Federal Rules, and, indeed, was explicitly disapproved in Judge Godbold's concurring opinion in *Johnson v. Georgia Highway Express,*

417 F.2d at 1125-1127. The Court emphasized again, as it had in *Rodriguez,* that "careful attention to the requirements of Rule 23 remains . . . indispensable." 50 LW at 4640. The district court's wholesale disregard of those criteria was fatal. In a crucial passage, the Court noted:

> The District Court's error in this case . . . is the failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23 (a) . . . Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.

Moreover, as was the case in *Rodriguez,* the manner in which the plaintiff in *Falcon* chose to proceed at trial indicated the inadequacy of class representation and the impropriety of class certification. The plaintiff's "evidentiary approaches to the individual class claims were entirely different." *Id.* This fundamental disparity was reflected in the district court's "bifurcated findings on liability" which, in the view of the Supreme Court, demonstrated that "the individual and class claims might as well have been tried separately." *Id.* Accordingly, based on the conduct of the trial, the Court concluded that, in *Falcon,* "the maintenance of [plaintiff's] action as a class action did not advance 'the efficiency and economy of litigation which is a principal purpose of the procedure.' " *Id.,* quoting *American Pipe & Construction Co. v. Utah,* 414 U.S. 538, 553 (1974).

In resolving the issue of class certification, a court cannot, of course, always prophesy the nature of proof a plaintiff, may present, on behalf of himself or the class, at trial. However, the Supreme Court emphasized the "tentative" nature of class certification orders, and the flexibility provided by the class action mechanism. "Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation." 50 LW at 4641. The district court in *Falcon* erred, not in its reliance

on the *Johnson* doctrine, but rather in its inattention, at all stages of the litigation, to the particular demands which devolve on the judge presiding over class actions.

Thus, the Court's opinion in *Falcon* stands as a reaffirmation of the essentially fiduciary duty of a court to supervise, throughout the case, the manner in which class claims are litigated, to insure that the requirements of Rule 23 are met, and that the interests of the passive class members are adequately represented. *See Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1975), *cert. denied*, 423 U.S. 864 (1975). Beyond this limited, though important, caution against lackadaisical application of the criteria of Rule 23, *Falcon* endorses "the proposition underlying the across-the-board rule — that racial discrimination is by definition class discrimination", 50 LW at 4641, and plainly implies that such actions are properly maintainable as class actions, provided the mandatory standards of Rule 23 are met.

The holding of the Court of Appeals for the Fifth Circuit that civil actions of this nature are maintainable as class actions relates to two connected but distinct concerns. Rule 23(a) embodies the requirements of typicality and commonality; these matters will be discussed below. Additionally, across the board class actions implicate a fundamental jurisdictional concern, rooted in the United States Constitution. Article III of the Constitution requires an actual case or controversy as a predicate to the exercise of federal judicial authority. At a minimum, this provision required

> the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" [citation omitted] and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."

Valley Forge Christian College v. Americans United for Separation of Church and State, _____ U.S. _____, 50 LW 4103, 4105 (1982) (citations omitted). Translated into the area of class actions, this constitutional requirement mandates that a class representative establish a nexus between her individual claim and the claim of the putative

class. The *Johnson* doctrine, and its support in an unbroken line of decisions over the past thirteen years, stands for the principle that class action plaintiffs challenging a broad policy of racial discrimination in employment establish such a nexus, if they personally have been victimized by one facet of the policy.

At the hearing on class certification, plaintiff offered statistical evidence which establishes, as a preliminary matter, disparities in the employment of blacks at the two plants in question. Evaluation of this evidence and its probative value with respect to the issue of standing is not dispositive, in any manner, of the issue pertaining to the existence *vel non* of discrimination at defendants' two plants. Even a preliminary inquiry into the merits of the substantive contention of the plaintiff class is foreclosed at this stage of the litigation. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177 (1974). However, for purposes of determining standing, the substantive allegations of the complaint are taken as true, and the plaintiff class is therefore entitled to any presumptions or inferences that might logically be drawn from the complaint or the statistical evidence adduced at the class certification hearing. *Warth v. Seldin,* 422 U.S. 490, 501 (1975). Individually, plaintiff Shipes has a colorable personal stake in this case, in that he claims he was treated unfairly by defendant, and that this inequitable treatment was based on race. Shipes has established standing for the purpose of bringing the present action.

Again, it must be emphasized that resolution of the question of standing is merely a threshold determination that a nexus exists between the claims of the named plaintiff and the claims of the class he purports to represent sufficient to meet the minimum constitutional standard for a "case or controversy." A determination that the named plaintiff has standing is in no manner dispositive of the issue of the propriety of maintaining the actions as a class action. To the extent the nexus required by the Constitution is satisfied by a finding of congruence between the claims of the named plaintiff and those of the class as a whole, this similarity will have bearing on the criteria of typicality and commonality set forth in Rule 23, F.R.CIV.P. However, as noted

above, the Supreme Court, in *Falcon,* stated the need "to evaluate carefully the legitimacy of the named plaintiff's pleas that he is a proper class representative under Rule 23(a)." 50 LW at 4641. Rule 23(a) sets forth four mandatory prerequisites for maintenance of class actions. That provision states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Each of the four criteria must be examined separately, and each must be satisfied before an action will be certified as a class action. Though the four inquiries are separate, they involve substantially overlapping considerations, especially among the requirements of commonality, typicality, and adequacy of representation. Indeed, some courts have concluded that the issues of commonality and typicality are identical. *See, e.g., Rakes v. Coleman,* 318 F. Supp. 181, 190 (E.D. Va. 1970). Notwithstanding, this conclusion contravenes the well-established presumption that a statute should not be interpreted in a manner that renders any of its provisions redundant or meaningless.

At the class certification hearing, defendant strenuously urged two separate, though related, objections to certification of a plaintiff class in the present action. Though the factual and legal underpinnings of these arguments are closely connected, defendant's contentions ultimately must be distinguished and analyzed separately. First, defendant contends that plaintiff Shipes, who was employed only at the Longview East plant, may not represent employees of defendant's Longview West plant. In substance, this argument contends that the questions of law and fact raised by Shipes' complaint lack the requisite commonality with the questions raised by the claims of those class members who

are, or in the past have been, employed at the Longview West plant. The contention will be evaluated under the rubric of commonality, as set out below. Second, defendant states that Shipes personally has alleged discriminatory treatment in the form of classification, pay, and lay-off decisions. Defendant contends that, even assuming the validity of these allegations, they are fundamentally different from, *e.g.*, claims of discriminatory discharge or failure to promote. Essentially, this argument involves an assertion that Shipes claims are not typical of the claims of other class members. It will be evaluated in the course of analyzing the "typicality" issue, *infra*.

III.

1. Numerosity

The requirement of numerosity is not to be resolved on the basis of an arbitrary numerical calculation, but rather with reference to the particular circumstances of the action. *General Telephone Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 330 (1980). The core of the numerosity requirement involves an analysis of the practical realities which allegedly render joinder of all putative class members impracticable, as opposed to impossible. *See Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980). As a general matter, smaller classes are more readily certified when the relief sought is, at least in part, injunctive. In such instance, the benefits would inure not only to the known class, but also to a future class of indefinite size (here, future employees at the two plants). *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975); *see* Rule 23(b)(2), and discussion of that Rule below. Properly considered, the plaintiff class should include these unknown future members. The joinder of such persons is unmistakenly and intrinsically impracticable. *Jack v. American Linen Service*, 498 F.2d 122, 124 (5th Cir. 1974). *See also Adams v. Jefferson Davis Parish School Board*, 76 F.R.D. 621, 622 (E.D. La. 1977).

Plaintiff has identified 311 persons who have been employed at the Longview East plant since that plant opened in 1979, based on an employee list produced by defendants pursuant to pre-trial discovery. Apparently, a

similar list of employees at the Longview West plant has not been disclosed. However, EEO-1 reports for the West plant show 23 black employees in 1978, 26 in 1979, 32 in 1980, and 39 in 1981. Additionally, the request of plaintiff for injunctive relief on behalf of the class creates a class of future employees, who must be included in the evaluation of numerosity. Plainly, plaintiff in this action has satisfied the requirement of numerosity.

2. Commonality

Rule 23(a)(2) requires that there be questions of law or fact common to the class. On its face, the rule does not mandate absolute commonality; nor does the rule require common questions of law *and* fact. The language of the rule is disjunctive. Factual differences among the claims of members of the class are not fatal, if common questions of law exist. *Like v. Carter,* 448 F.,2d 798 (8th Cir. 1971), *cert. denied* 405 U.S. 1045 (1972). Generally, the approach to commonality has been flexible. The requirement is considered satisfied, if the common questions raised by factual or legal elements in the action predominate over any differences or variations which exist. *E.g., Escalera v. New York City Housing Authority, 425 F.2d 853 (2nd Cir. 1970).*

In actions involving claims of racial discrimination, the demarcation between issues which involve factual determinations and those which require legal conclusions is not always clear. The Supreme Court recently disapproved the doctrine that, in such actions, the resolution of the issue of the existence *vel non* of discrimination was an "ultimate fact" and so was different, in a fundamental sense, from other findings of fact, which were "subsidiary" to that final issue. *Pullman-Standard v. Swint,* _____ U.S. _____, 50 LW 4425 (1982). In the aftermath of this decision, it is not presently clear precisely which conclusions are factual and which legal, in actions involving claims of racial discrimination. However, that nettlesome issue need not be resolved, in order to conduct the present inquiry into commonality, for, as noted, common issues of fact *or* law are sufficient to meet the standard of Rule 23 (a) (2).

In any event, allegations of class-wide discrimination in all different phases of employment present an intricate blend of legal and factual issues. Most fundamentally, the complaint in this action presents the issue of law whether Trinity Industries maintains an employment policy that violates the federal law proscribing discrimination in employment on the basis of race. As set forth previously, plaintiff alleges that the overall policy of discrimination is effected in a variety of ways, at different stages of employment. Though the cases of individual employees affected by different aspects of the overall policy may present variations in the factual elements of the claims, the basic legal standard under which the claims will be evaluated is common to all members of the class. Moreover, certain fundamental factual matters, involving the circumstances of employment at the plants, will have been experienced commonly by all members of the class. Finally, the considerations which justify the maintenance of across the board class actions also support the conclusion that this form of civil action presents common questions of law and fact. The central issue here is the alleged maintenance and pursuit, by Trinity Industries, of an employment policy which discriminates on the basis of race. If such a policy exists, the legal claims of the named plaintiff are, by definition, commonly held by all members of the plaintiff class.

As stated above, defendant contends that, if a class action is appropriate, the plaintiff class should be limited to employees of defendant's Longview East plant, where plaintiff Shipes was employed, and where he would have encountered any alleged discrimination in employment. Defendant argues that the factual and legal issues raised by a claim of racial discrimination in employment at the Longview East plant have nothing in common with a claim of that nature involving the employment policies and practices in force at the Longview West plant. In support of this argument, defendant avers that the two plants are operated autonomously, and that the employment policies at the plants are wholly discrete.

It appears that the individual plant managers at the two plants involved in this action have a substantial amount of

independence in making and enforcing employment policy. Beyond question, the central management of Trinity Industries has delegated to its local plant officials a large degree of responsibility in conducting the daily operations of the plants. Yet, this decentralization is not absolute, and as a factual matter the plants are related in crucial ways. The employment handbook of Trinity Industries governs employee relations at both plants. The handbook is in no sense comprehensive, but the limited guidance provided by its terms does connect the two Longview plants in a manner which suggests at least a limited form of commonality.

Defendant urges that the handbook provides only the most peripheral direction for plant managers in their dealings with employees. In view of the sparse particulars contained in the handbook, this assertion is plausible. However, it appears that, other than this handbook, defendant maintains no formulation of its policies and practices with respect to employment. The lack of objective standards for employment renders the process of selecting employees, delegating to them job assignments, and reviewing their employment record, an intensely subjective process. These subjective employment procedures "provide a ready mechanism for racial discrimination," especially when implemented by white supervisors. *Robbins v. White-Wilson Medical Clinic, Inc.*, 660 F.2d 1067 (5th Cir. 1981); *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419, 426 (5th Cir. 1980), *vacated on other grounds*, 451 U.S. 902 (1981). If the central management of defendant company has not promulgated a set of reasonably objective criteria for employment procedures, that failure, in itself, might, under the prevailing law of employment discrimination, present a legal and/or factual issue common to the two Longview plants.

Moreover, defendant maintains a common insurance plan and a unified pension and retirement system, applicable to employees at both plants. If, as plaintiffs contend, the compensation system of defendants is infected with racial animus, then these centralized systems, which are part of the overall remuneration scheme, will be implicated in the present action, and therefore present common questions. *See, Penk v. Oregon State Board of Higher Education*, 93F.R.D. 45 (D. Ore. 1981).

Defendant contends that the pay scales are wholly within the discretion of individual plant managers. However, it appears that on five separate occasions in the period between the opening of the Longview East plant in 1979 and December 1981, identical wage increases were granted employees at both Longview plants. Furthermore, in June 1980, when a large number of employees at the East plant were laid off, a significant number of those employees were directly transferred to the West plant, and they immediately began working at that facility. At the certification hearing, a defendant contended this fact emphasized the *lack* of commonality between the two plants. This argument is specious. In reality, the transfer of workers between the two plants stands as persuasive evidence of the coordination of employment practices at the Longview facilities, despite the protestations of autonomy and discretion. *Petty v. People's Gas Light & Coke Co.*, 86 F.R.D. 336, 340-41 (N.D. Ill. 1979); *see also Penk v. Oregon St. Board, supra*, 93 F.R.D. at 49-50; *Hairston v. McLean Trucking Co.*, 62 F.R.D. 642,663 (M.D. N.C. 1974) ("coordination of employment policies" sufficient to overcome facial decentralization of management decisions); *Williams v. New Orleans Steamship Association*, 341 F. Supp. 613 (E.D. La. 1972).

Finally, defendant contends that commonality does not exist between the two Longview plants, because the two facilities do not produce identical products, and the job classifications and descriptions applicable to the plants are not exactly the same. This contention is belied by a simple review of the job descriptions for the plant provided to plaintiffs through discovery. The verbal descriptions substantially overlap, and include a number of job classifications which are virtually identical. Were the job classifications and categories at the two plants "entirely different", and the decentralization of management "absolute," certification of a class including employees at both plants would be inappropriate. *See Duncan v. State of Tennessee*, 84 F.R.D. 21, 35 (M.D. Tenn. 1979); *Carpenter v. Herschede Hall Clock Division*, 77 F.R.D. 700 (N.D. Miss. 1977). However, as the court in *Duncan v. State of Tennessee*, stated:

> [P]roof at this point does not so clearly show that employment practices and personnel decisions within each division are *totally* autonomous so as to preclude class treatment.

84 F.R.D. at 35 (emphasis supplied). *See Arnett v. American National Red Cross,* 78 F.R.D. 73, 76 (D.D.C. 1978); *Leisner v. New York Telephone Co.,* 358 F. Supp. 359, 371 (S.D. N.Y. 1973); *Ste. Marie v. Eastern R.R. Assoc.,* 72 F.R.D. 443, 448 (S.D. N.Y. 1976); *see also Fujita v. Sumitomo Bank,* 70 F.R.D. 406, 410 (N.D. Cal. 1975); *Doe v. First City Bancorporation,* 81 F.R.D. 562 (S.D. Texas 1978).

This preliminary determination regarding commonality is founded on a substantial amount of evidence, and the reasonable inferences drawn from that evidence, which tends to establish a series of connections between the two Longview plants. But if, during the progression of this case, defendant is able to support its contentions concerning the autonomy of employment decisions in the two plants, the class may, at that time, be decertified, or limited in the manner dictated by the evidence. *See Duncan v. State of Tennessee, supra,* 84 F.R.D. at 35. For the present, plaintiffs have amply demonstrated a connection between the two Longview plants, for purposes of establishing the requisite degree of commonality.

3. Typicality

Rule 23 also requires that the claims of the named plaintiffs be typical of the claims of the class as a whole. Simply put, this provision requires that the claims of the named plaintiff be established by factual allegations concerning his own experience, and that they also be typical of the individualized claims of the other class members. Typicality does not mean identity, but rather a broader form of congruity. *See Herbert v. Monsanto,* 576 F.2d 77 (5th Cir. 1978), *vacated on other grounds,* 580 F.2d 178 (5th Cir. 1978); *Leisner v. New York Tel. Co., supra,* 358 F. Supp. 359 (S.D.N.Y. 1973). The claims of plaintiff Shipes are typical of the claims of the class as a whole. As already stated, Shipes alleges he was subjected to personal discriminatory treatment in a variety of forms, including discrimination in classification,

pay, and lay-off decisions. These allegations span a broad range of the employment practices of defendant.

Defendant challenges the typicality of Shipes' claims. It contends that any experience an employee might have with discriminatory treatment in employment is essentially unique. In other words, defendant appears to argue that an employee victimized by discrimination in job classification lacks typicality with an employee who might have been denied a promotion for a discriminatory reason. In essence, defendant claims that each employment decision is discrete and, therefore, atypical.

This argument is confuted by the entire line of cases beginning with, and descending from *Johnson*. Indeed, in lodging and developing this argument in its post-hearing brief, defendant avoids entirely the doctrine of across the board class actions challenging discrimination in employment. That doctrine, explicated above, is plainly fatal to defendant's contention regarding the typicality of Shipes' claim. Isolation of one portion of defendant's argument will highlight its implausibility.

Defendant argues with special vigor that termination and promotion decisions are unique and are not susceptible to class treatment, because they involve highly particularized factual matters based on the employment records of specific employees. ("[T]he evidence as to each termination is unique to the named plaintiff or class member." Defendant's post-hearing brief, p. 14; "[P]romotion procedures are 'unique to each employee' and class action relief is not appropriate for claims of discrimination in promotion." *Id.* at p. 15.) However, from the inception of the across the board doctrine, the Court of Appeals for the Fifth Circuit has permitted class plaintiffs challenging discriminatory employment practices to represent former employees who had been discharged, as well as employees who claimed to have been victimized by discriminatory promotion practices. Indeed, in *Johnson* itself, the court approved a class action on behalf of a "class harmed by the alleged discrimination in hiring, *firing, promotion* and maintenance of facilities." *Johnson, supra,* 417 F.2d at 1124 (emphasis

supplied). *See also Payne v. Travenol Laboratories, supra,* 565 F.2d at 899. The claims of plaintiff Shipes, involving as they do allegations of racial discrimination in certain facets of employment at defendant's Longview East plant, are typical of the claims of the class as a whole, which includes employees who allegedly have been subjected to discriminatory treatment in the full range of employment at both Longview plants.

4. Adequacy of Representation

Rule 23(a)(4) requires that the named plaintiff fairly and adequately represent the class. This standard involves two considerations: the adequacy of class counsel, and the adequacy of the named plaintiff's assertion of the rights of the class. *In Re General Motors Corporate Engine Interchange Litigation,* 594 F.2d 1106 (7th Cir. 1979). The court is familiar with the counsel representing the plaintiff class, and is amply satisfied that she will conscientiously and competently handle all phases of this action. The concern for adequacy, as it relates to the class plaintiffs, in part requires that the interests of the named plaintiffs substantially coincide with those of the class as a whole. In large part, this consideration overlaps with the commonality and typicality requirements. The fundamental interest of the entire class is equitable relief from an assertedly pervasive policy of racial discrimination in employment. Shipes has demonstrated, in the course of this action thus far, that his efforts in attempting to secure such relief will be vigilant. Beyond this preliminary point, it is necessary that the interests of the plaintiff in remedial relief not conflict, in some fatal manner, with the interests of the class as a whole or with other individual members of the class. All plaintiffs in this action have a common interest in the eradication of racially discriminatory employment practices and policies. Accordingly, no conflict at this level is apparent. Should conflicts emerge at a later point in this action — for example, in the award of equitable relief in the form of reinstatement — such conflicts might appropriately be resolved by the use of sub-classes or other modifications of the class structure warranted by the evidence. *See Oatis v. Crown Zellerbach, supra,* 398 F.2d 496 (5th Cir. 1968); *Johnson v.*

Uncle Ben's Inc., supra, 628 F. 2d 419 (5th Cir. 1980), *vacated on other grounds,* 451 U.S. 902 (1981).

In an attempt to demonstrate that plaintiff does not adequately represent the interests of a class of black employees at defendant's Longview plants, defendant has submitted a number of affidavits, sworn to by employees, stating they do not wish to be represented by Shipes in a class action against defendant company. Such statements are intrinsically suspect, in view of the circumstances of their submission. Their credibility is, at best, tenuous. Moreover, it is well-established that the mere fact that potential class members desire to be omitted from the class does not refute the legitimacy of the class. *Williams v. New Orleans Steamship Ass'n,* 673 F.2d 742, 755 (5th Cir. 1982); *compare Bailey v. Ryan Stevedoring Co.,* 558 F.2d 551 (5th Cir. 1976), *cert. denied,* 432 U.S. 1052 (1977). The bare fact that an employee of defendant company believes that his employer does not engage in racially discriminatory employment practices does not establish that belief as a fact. Nor does an affidavit stating that belief render the particular employee unable to participate in the advantages of any equitable relief which might be awarded as a result of a conclusive legal demonstration that defendant did, in fact, engage in proscribed racial discrimination. As a class plaintiff, Shipes has demonstrated he will vigilantly advocate his claims, and also the claims of the Class, against the defendant company. Hence, he has satisfied the requirement of Rule 23(a)(4).

5. Relief generally applicable to the class

Apart from the requirement that any potential class representative satisfy each of the four portions of Rule 23(a), the Federal Rules additionally require that the named plaintiff satisfy at least one of the three sub-sections of Rule 23(b). Plaintiffs in this action assert their claim meets the test of Rule 23(b)(2). This section provides that an action may be maintained as a class action, if the prerequisites of Rule 23(a) are satisfied, and in addition:

> the party opposing the class has acted or refused to act on grounds generally applicable to the class,

thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

In this action, plaintiff class charges that Trinity Industries has maintained a policy of racial discrimination against the employees at its two Longview plants. Though the specific content of the policy may vary from member to member within the class, the claims of the class are shared in common, and the alleged actions of Trinity Industries, here challenged, are generally applicable to the class as a whole. This alleged pattern of conduct, attended by the possibility of equitable relief from its effects, renders the action maintainable as a class action under Rule 23(b)(2). *See Bing v. Roadway Express, Inc.*, 485 F.2d 441, 447 (5th Cir. 1973); *Rowe v. General Motors Corporation*, 457 F.2d 348, 359 n. 24 (5th Cir. 1972). *See also* Advisory Notes to Rule 23, 39 F.R.D. at 102 ("Illustrative [of Rule 23(b)(2) actions] are various actions . . . where a party is charged with discriminating against a class, usually one whose members are incapable of specific enumeration.").

On the basis of the foregoing, this action may properly be maintained as a class action. The present suit is a proper means by which past, present, and future black employees of the two Longview plants operated by Trinity Industries should seek legal relief from their claims of racial discrimination in employment. Accordingly, it is

ORDERED that plaintiff's motion for class certification is GRANTED. It is further

ORDERED that the above-styled civil action shall proceed as a class action pursuant to Rule 23(b)(2), F.R.CIV.P. It is further

ORDERED that the plaintiff class consist of all past, present, and prospective black employees of the two Longview plants operated by Trinity Industries, who have been subjected to unlawful discrimination by their employer on account of race, since January 10, 1980, or will be subjected to such discrimination in the future. It is further

ORDERED that defendant's motion to dismiss the present action is, in all things, DENIED.

SIGNED and ENTERED this 29th day of July, 1982.

WILLIAM WAYNE JUSTICE
Chief Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

NO. TY-80-462-CA

FOREST HENRY SHIPES, et al.,

v.

TRINITY INDUSTRIES, INC.

ORDER

On December 18, 1990, a hearing has held on the preliminary damage model, proposed by the court appointed expert witness, Dr. Bernard Yancey, for use in determining the amount of compensation owed individual plaintiff class members, by reason of the discrimination which defendant was determined to be responsible for in the liability phase of these proceedings.

After careful review of the preliminary damage model, and the objections to it articulated by counsel at the hearing, it appears that a judicial determination regarding the general approach that should be use in developing the damage model will expedite development and implementation of the final model. Therefore, this order will establish the guidelines that Dr. Yancey is to follow in constructing the final model to be submitted to the court.

General Methodology

At the hearing on this matter, the defendant objected to the general approach taken by Dr. Yancey, which attempts to determine the effect of discrimination on every such individual class member and award every such class member

damages accordingly. Defendant argues that since it was determined to have discriminated against plaintiffs as a class, the damages should be determined for the class as a whole, and then each class member should be awarded a pro rata share of the entire damage amount.

This objection miscomprehends the purpose of the remedy phase of class action litigation. The Court of Appeals for the Fifth Circuit has described phase II, or the remedies phase, of a class action as follows:

> At the start of a phase II trail[1] the employer faces a prior adjudication of class discrimination. The procedures thereafter assume that fact and are calculated to identify individual claimant's relationship to the condemned practices without a second trial of the issue of class discrimination.

Richardson v. Byrd, 709 F.2d 1016, 1021 (5th Cir. 1983).

Both Dr. Yancey and the defendant's expert witness agree that the damage calculation method proposed by Dr. Yancey, which awards an individual plaintiff damages based on the mean wages paid to a white employee with the plaintiff's qualifications, is the most accurate method of determining the expected wage rate of an individual with a plaintiff's particularized qualifications. It is impossible to determine the precise monetary effect defendant's discrimination had on particular plaintiffs; however, basing individual recovery on the difference between a plaintiff's expected and actual wages seems to be the best method of approximately the effect of discrimination.

The defendant argues, correctly, that this method will overcompensate some plaintiff class members and undercompensate others. In the absence of discrimination, some black employees would be paid below, and others above, the mean wage for an employee with their respective qualifications. The same would be true of white employees. However,

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[1]Although the Fifth Circuit is describing a phase II which is accomplished through a second trial, its discussion is equally applicable to the situation at bar, where the court will make a determination of remedies absent a full scale trial.

defendant has not proposed, and the court is unaware of, any feasible way of determining which plaintiff class members would actually have been paid above and below the mean. The ability to make this determination not being available, awarding plaintiff class members damages based on the mean wage paid to white employees with similar qualifications is the most equitable method attainable. As the Fifth Circuit has admonished:

> Difficulty in calculating the precise amount of back pay does not defeat the right itself. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974), *cert. denied* 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed. 2d 74 (1979). Indeed "in computing a back pay award two principles are lucid: (1) unrealistic exactitude is not required, and (2) uncertainties in determining what an employee would have earned before discrimination, should be resolved against the discriminating employer." *Id.* at 260-61 (footnotes omitted).

Salines v. Roadway Exp. Inc., 735 F.2d 1574 (5th Cir. 1984).

Discrimination in Initial Hiring Rates — Both Plants

Back pay for discrimination in initial hiring will be awarded to particular class members, based on the difference between the average starting wage paid to a white employee with the class member's qualifications and the actual starting wage paid to such class member. However, the method of calculating damages for discrimination in initial wage paid to certain employees re-hired after a lay-off or termination of employment, will be based on a formula using a) the higher of the employee's expected or actual wage when previously terminated or laid off, b) the number of months between termination and re-hire, and c) the increase in wages that has occurred over that time. This method will be used, because Dr. Yancey has stated that this formula correctly predicts 90% of the re-hire wages actually paid to the white employees, thereby making it a more accurate predictor of what plaintiff class members

should have been paid at re-hire than the formula developed by Dr. Yancey to determine damages in initial starting wages.[2]

Promotions — East Plant only

The formula used for promotions will use the same methodology as that used to determine the wage rate at the initial hire. The damages to which a specific plaintiff class member is entitled will be the difference between the average increase in wages experienced by white employees and the actual wage increases paid to each class member with similar qualifications.

Layoffs-West Plant

During the liability phase of the trial, it was determined that the defendant discriminated against the plaintiff class by laying off a disproportionate number of black employees. Ideally, damages for this type of discrimination would be awarded to the black employees who would not have been laid off, or been laid off at a later date, had there been no discrimination by the defendant. However, neither party has proposed a method of determining which of the black employees laid off by the defendant would have retained their positions in the absence of discrimination. Therefore, the most equitable method of awarding damages for this type of discrimination is to determine the total number of days that the group of black employees laid off would have worked except for discrimination, and then award each class member who was laid off damages based on a pro rata share of those days.

Given the above, damages for class members who were laid off by defendant should be determined as follows: 1) determine the median days worked by the group of white employees who were laid off or continuously worked a given

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[2]The formula developed by Dr. Yancey to predict the wages at initial hire accurately predicts about 40% of the white employees' initial wages. Dr. Yancey testified, and the defendants do not contest, that this is a standard level of accuracy for this type of calculation.

calendar quarter;[3] 2) determine the median days worked by the group of similarly situated black employees; 3) use these two medians to determine a median number of days for the entire workforce;[4] 4) determine the total number of days that must be added to the days worked by the black employees to make the black employees' days-worked-median equal to the workforce median[5]; and 5) award all plaintiff class members who were laid off damages based on their individual pro rata shares of these days multiplied by their respective wage rates at the time they were severally laid off.

Lay-offs and terminations — East Plant

The defendant was held to have discriminated against the plaintiff class in both lay-offs and terminations for cause at the East Plant. The same considerations governing the award of damages for lay-offs at the West Plant are present in this damage award calculation; therefore, the same formula as that outlined above should be used, except that a) the median days worked will be determined using the

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[3]Damages will be determined on a quarterly basis.

[4]Since the total number of persons laid off by the defendant in a given quarter would remain the same with or without the discrimination at issue here, it would be unfair to add enough days to the black employees' days worked, in order to increase the black employees' median to that of the white employees. This fact is best illustrated by the following example: assume there are an equal number of black and white employees in defendant's workforce and that 75 black employees and 25 white employees were laid off. If it be assumed, as must be done absent evidence to the contrary, that an equal number of black and white employees would have been laid off excluding discrimination, then 50 black and 50 white employees should have been laid off. Therefore, the black employees should be awarded damages for having 25 black employees laid off who should not have been laid off. Basing the damage award on the number of white employees laid off would result in the black class being compensated as though 50 black employees were laid off who should not have been.

[5]Both employees who continued to work and who were laid off must be used in the calculation of median days worked. Otherwise, plaintiffs would only be compensated to extent that they were laid off sooner than white employees who were laid off in the same calendar quarter; they would not be compensated for the damage caused by being laid off when they should have been retained as employees for the entire quarter.

days worked by terminated for cause, as well as laid off and continuously working, employees, and b) both terminated for cause and laid off plaintiff class members will share in the damage award.

Outstanding Data Problems

The defendant has been unable to supply Dr. Yancey with the qualifications of a number of the plaintiff class members, because it has been unable to locate the personnel applications for these individuals. Without these records, the best method for determining these individuals' qualifications is to ask the individuals themselves to recall their qualifications at the time that they applied for employment at Trinity. Therefore, defendant and plaintiff's counsel should make every effort to find these individuals and forward their qualifications to Dr. Yancey as soon as possible. Dr. Yancey will also submit to this court for consideration a method for approximating the damages of these individuals, for use in the event these plaintiff's cannot be located. Plaintiff has objected to using such an approximation to determine the class members final damages, and will submit to the court a draft of an order which would allow recalculation of any damages which are initially approximated, if and when the class members' actual qualifications become available.

Further, in order to fully compensate East Plant class members for discrimination in promotions, it was determined that salaried white employees who began as hourly plant employees be added to the database. See Order dated October 1, 1990. Specifically, defendants must supply Dr. Yancey with the personnel records for all hourly plant employees, hired during the same period as the plaintiff class members, who became salaried employees.

Finally, Dr. Yancey has requested that the cut-off date for class membership be clarified. The class includes all black employees who were employed by the defendant between January 10, 1980, and March 31, 1984. Employees who ended employment with the defendant on January 10, 1990, or who began employment on March 31, 1984, would be

included in the class, but not employees whose last day of work was January 9, 1980, or whose first day of work was April 1, 1984.

Timetable for Finalizing the Damage Calculations

All missing data should be supplied to Dr. Yancey on or before January 15, 1991. Dr. Yancey will then submit final copies of the damage calculations formula to both parties, and to the court, on or before February 1, 1990. Both parties will have two weeks after receipt of the final damage model in which to submit final objections to the model. After review of the parties' objections, a final hearing on the matter will be set, if appropriate; otherwise, a final ruling on the calculation of damages will be issued.

Based on the above, it is

ORDERED that on or before January 15, 1991, the defendant provide Dr. Yancey with personnel histories on all employees hired at the East Plant between January 10, 1980, and April 1, 1984, who at any time after being hired became salaried employees. Further, it is

ORDERED that both parties make every effort to determine the actual qualifications of the plaintiff class members whose personnel files are missing, and that both parties notify this court on or before February 1, 1991, whether they have been successful in determining such information. Further, it is

ORDERED that Dr. Bernard Yancey shall develop a final model for the calculation of damages in the above numbered action, in accordance with the guidelines stated in this order, and shall submit such model to the court, and to both parties, on or before February 1, 1991. Finally, it is

ORDERED that both parties submit final objections to the damage model proposed by Dr. Yancey within two weeks of receipt of the model from Dr. Yancey.

SIGNED this 27th day of December 1990.

WILLIAM WAYNE JUSTICE

William Wayne Justice
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 91-4961

FOREST HENRY SHIPES, et al.,
Plaintiffs-Appellees,

versus

TRINITY INDUSTRIES,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 5, 1993, 5 Cir., _____, _____ F.2d _____)
(June 22, 1993)

Before WISDOM, JOLLY and DEMOSS, JR., Circuit Judges

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

E. GRADY JOLLY

United States Circuit Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

July 2, 1993

Mr. David Maland, Clerk
U.S. District Court
211 W. Ferguson, Room 106
Tyler, TX 75702

No. 91-4961 — SHIPES *-vs-* TRINITY INDUSTRIES
(D.C. No. TY 80-462-CA)

(X) Enclosed to you only is a certified copy of the judgment of this Court in the above cash issued as and for the mandate.

( ) The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

( ) Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

Enclosed herewith are the following additional documents:

(X) Copy of the Court's opinion.

( ) Original record on appeal or review. ( ) Volumes
(TO BE RETURNED SHORTLY)

( ) Other original papers forwarded with record.
( ) Envelope ( ) Box

(X) Bill of Costs approved by this Court.
(X) Copy enclosed to counsel.

Sincerely,
RICHARD E. WINDHORST, JR., Clerk
By: Melissa LeBlanc
Deputy Clerk

cc: (Letter Only)
Judge William Wayne Justice
Mr. George A. Harper
Ms. Nell Hahn

MDT-1
Rev. 5/92

FILED
OCT 27 1993
OFFICE OF THE CLERK

No. 93-424

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

TRINITY INDUSTRIES, INC.,
Petitioner,

v.

FOREST HENRY SHIPES, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS FOREST HENRY SHIPES, ET AL., IN OPPOSITION

Nell Hahn
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(318)234-1310

Counsel for Respondents

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether it is an abuse of discretion for a trial court to find that there are common questions of law or fact in a Title VII class action involving two related plants with the same entirely subjective employment practices, where those practices are shown to have resulted in racial discrimination against the named plaintiff and members of the class at both plants.

2. Whether the trial court abused its discretion in adopting the backpay remedy in this case.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. 93-424

TRINITY INDUSTRIES, INC.,
Petitioner,

v.

FOREST HENRY SHIPES, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS FOREST HENRY SHIPES, ET AL., IN OPPOSITION

OPINIONS BELOW

In addition to the opinions included in the appendix to the petition for writ of certiorari, the district court's memorandum opinion on liability, dated October 10, 1985, and its order on damages dated, July 29, 1991, contain findings of fact and conclusions of law that are relevant to this Court's decision as to whether or not to grant the writ. The former is reported as *Shipes v. Trinity Industries, Inc.*, 40 Fair Emp. Practice Cas. 1136 (E.D.Tex., 1985), and is set forth in the appendix to the brief of Respondent at A-1 to B-1. The latter is unreported, and is set forth in Respondent's Appendix at B-1 to B-9.

STATEMENT OF THE CASE

Trinity Industries, Inc., a manufacturer of railcars and structural steel products, operates over thirty production facilities in 13 states. Two of its railcar manufacturing facilities are located in Longview, Texas. The majority of workers at both plants are welders or welder's helpers (Resp. App. A-14). Respondent Forest Henry Shipes, a black male, was employed at one of these facilities as a welder's helper. He claimed that he personally was discriminated against in decisions concerning his initial job placement, pay, promotions, and layoff, because of Trinity's practice of allowing decisions as to all of these matters to be made in an entirely subjective fashion by its all-white supervisory force. He challenged this practice under both the "disparate impact" and the "disparate treatment" theories of discrimination under Title VII. (Resp. App. A-32 - A-33).

The trial court's order on class certification (Pet. App. B-1), issued on July 30, 1982, permitted Shipes to represent a class composed of all black employees of Trinity's two Longview plants. The trial court recognized that its decision on class certification at that early stage of the litigation was necessarily based on limited information and tentative, and that it could be revised in light of later developments (Pet. App. B-9). Trinity subsequently filed motions to dismiss the West Longview plant from the action and to decertify the class for various other reasons.

After trial of the liability issue in late 1984, the trial court reconsidered its class certification decision in light of all the evidence. Petitioner has unaccountably failed to include in its appendix the trial court's memorandum opinion on liability, dated October 10, 1985 (Resp. App. A). In this decision, contrary to Petitioner's contention (Pet. at 5) that the trial court "refused to reconsider its July 29, 1982 Order or to limit the class in any way," the trial court discussed all of the grounds for decertification that Trinity had raised and narrowed the class to exclude salaried employees. The class as finally certified included only black hourly employees at both plants from January 10, 1980 to April 1, 1984 (Resp. App. A-3-A-11). However, the court did not change its order with respect to the only issue that Petitioner has raised here and with the Court of Appeals—that of the commonality of Shipes' claims with those of class members at the West plant.

The trial court found that the personnel practices at both plants in the areas of initial placement and pay, promotion, and layoff were entirely subjective and virtually identical. Although the hourly workforce was approximately 20% black, only one black ever held a supervisory position at either plant.[1] There was no posting of job vacancies, either for initial hire or for promotion (Resp. App. A-22). The screening of candidates for employment was left entirely up to the subjective discretion of the personnel manager (Resp. App. A-23 - A25). Initial placement and pay decisions were based on a subjective assessment of employees' abilities (*Id.*). Such written job descriptions as did exist at both plants were similar (Pet. App. B-17; Resp. App. A-5), but they were so vague and subjective as to provide no actual guidance in placement or promotion decisions (Resp. App. A-16 - A-22). Many of the job titles at both plants were virtually meaningless as descriptions of the work actually performed (Resp. App. A-21 - A-22). Welding tests were administered in so random a fashion as to be meaningless (Resp. App. A-32). "Promotions" at both plants were synonymous with pay raises. At both plants, they were left to the foreman's unreviewable, subjective discretion, without meaningful guidelines (Resp. App. A-39 - A-41). There was no written evaluation procedure at either plant during virtually the entire class period (Resp. App. A-40). Layoff decisions were made in the same fashion at both plants—by an all-white supervisory force, according to subjective judgments, without any objective criteria or guidelines (Resp. App. A-48 - A-49).

The trial court also found as a factual matter that the employment system in effect at both plants resulted in disparate treatment of black employees in initial placement, pay, and layoff decisions (Resp. App. A-35, A-37, A-54 - A-55, A-71). Following Fifth Circuit precedent that was in effect prior to this Court's decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), the trial court did not analyze Respondents' claims under the disparate impact model, because they involved the use of subjective criteria.

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[1] The single black supervisor was not promoted until May, 1983—well after this litigation had begun (Resp. App. A-7, n. 18).

In making its findings of classwide discriminatory treatment, the trial court relied on the same type of evidence for both plants. In particular, most of the statistical models that both sides used to demonstrate or refute that there was racial discrimination were identical for the two plants. The same experts testified regarding all the statistical evidence and regarding the subjectivity of Defendant's practices; and many individual witnesses testified as to conditions at both plants. The same injunctive relief was decreed for both plants.

The trial court also found that the two plants were not, as Trinity contended, "separate and autonomous," but that, "as a factual matter, the plants are related in crucial ways" (Pet. App. B-16; Resp. App. A-4 - A-7). The linkages that the trial court found were not, as petitioner suggests here, limited to the maintenance of common employee group benefits programs. During most of the class period, the two plants produced the same product, railroad tank cars. The plants were managed by the same individual from 1982 to the end of the class period. Management and supervisory personnel were transferred between the plants, including the personnel manager from the West plant, who moved to the East plant in February 1982 and remained there for the rest of the class period. There were coordinated transfers of hourly production workers between the two plants.

The employment handbook was the only written document formulating management policies and procedures at the two plants, and it was common to both. Both plants used the same forms for applications, pay increases, layoffs, and discharges. General salary increases and changes in shift differentials took effect on exactly the same dates at both plants.

After finding that Petitioner practiced discrimination against the named plaintiff and other black employees in initial placement and pay and layoffs at both plants, and as well in promotions and discharges at the East plant, the trial court requested that the parties brief the issue of remedies. Both sides advocated using a formula obtained from multiple regression analysis to calculate back pay awards.

A formula approach to the determination of back pay was desirable because of the trial court's findings that Petitioner's employment system relied on subjective, standardless decision- making and that its job classifications were fungible. Rather than being hired into a specific vacancy with clear, predetermined required qualifications, employees were assigned a job classification and pay level based on the preferences of the personnel director or foreman. Job descriptions were vague and unhelpful (Resp. App. A-16 - A-20). In the context of this system, Petitioner discriminated against black employees by tending to place them in lower-paying positions than whites with the same or lower qualifications (Resp. App. A-25; A-35; A-37).

After reviewing the parties briefs on remedies, the court appointed an independent expert to develop a damage model. The court-appointed expert used multiple regression analysis to arrive at a statistical estimate of what each particular class member would have received at hire if he had been treated the same as white employees *with the same experience and qualifications* (including months of pre-hire experience in different types of jobs, educational background, trade school training, and other factors). The starting pay rate for whites that was used for comparison was not simply, as Petitioner asserts, "the mean of all the actual starting rates for whites" (Pet. 6). It was, rather, the statistical equivalent of the mean of the starting rates for whites *with the exact qualifications of each individual black class member.* If a class member was paid less than this amount, he was awarded back pay equal to the difference between this amount and his actual pay. If he was paid more than the average pay rate of white employees with his qualifications and experience, he did not receive an award. Thus, the estimate of what each black employee would have been paid if he had been treated the same as whites with the same qualifications served both as a triggering mechanism, signaling entitlement to an initial pay award, and as a measure of damages. These calculations were done separately for each class member, and the amount that any class member was paid did not affect the amount that any other class member received in back pay.

Petitioner's own expert testified that, *for each individual black employee, the best estimate of what he should have been paid, if treated the same as an equally-qualified white, was the estimate that*

the court in fact used. This was also the testimony of the court-appointed expert. (Pet. App. C-2).

The court-appointed expert presented a preliminary damage model to the trial court at a hearing on December 18, 1990. Petitioner objected to the model because of its focus on compensating individual class members who were paid less than whites with the same qualifications. Petitioner insisted that the court should instead adopt a remedy which insured that black employees as a group were paid an amount equivalent to the amount that was paid to whites as a group. According to Petitioner, each black employee would receive an equal share of the class-wide award, regardless of his own qualifications and regardless of how he was actually treated relative to whites with his qualifications. Thus, blacks who were paid more than the average for whites with equal qualifications would receive the same amount as those who were paid much less. Only differences in length of employment would cause awards to vary among class members.

In an order dated December 27, 1990, which specified the general approach that was to be used to develop the final damage model (Pet. App. C-1), the trial court rejected the Petitioner's argument. It held that the proper focus of the remedy phase of an employment discrimination class action was on identifying each individual claimant's relationship to the employment practices that had been held, in the liability phase, to have violated Title VII. Since both the court-appointed expert and Petitioner's own expert had testified that the court-appointed expert's model was the most accurate method of determining the extent to which each class member had been damaged by discrimination (Pet. App. C-2), the court adopted it in preference to Petitioner's suggested approach.

As the final damage model was developed, the Petitioner continued to urge its objection. Respondent pointed out, however, that the class-based damage model proposed by Petitioner resulted in a much smaller award to the plaintiff class than the individualized approach used by the court-appointed expert, because it in effect deducts amounts that some black employees were "overpaid" by Petitioner from the award to class members who suffered economic harm. The reason for this can be seen in connection with the example given in the

Petition at 9, involving damages awarded to five hypothetical black employees after comparing them to five whites. First, it must be noted that, under the model the trial court adopted, all of these employees had identical pre-hire qualifications—months of welding experience, trade school training, education, and other relevant background characteristics. The best estimate of what the five equally-qualified blacks would have earned in the absence of discrimination was $7—the average of the salaries of the equally-qualified whites. The trial court awarded the three blacks who earned less than this amount the difference between $7 and their actual salaries. One of the five blacks earned more than the mean for whites with these qualifications. Under the model adopted by the trial court, this employee did not receive an award, because he was not underpaid. The amount that he was paid did not affect the awards to the other four.

Under the approach advocated by Petitioner, the amount by which this one employee was "overpaid," relative to whites with his qualifications, was deducted from the amount awarded to the group, to make sure that blacks as a group did not end up receiving more than whites as a group. The effect of this on the overall award to the class was substantial. Though only a relatively small number of blacks were overpaid, the damage model multiplied salary by length of time employed. Thus, an "overpayment" to a single long-term black employee could wipe out awards to several short-term black employees. Indeed, under the alternative calculations submitted by Petitioner in the trial court, there would be no award to employees discriminated against in initial pay at the West plant, in spite of the unchallenged finding that such discrimination had occurred.[2]

In an order on the damage model dated July 29, 1991 (Resp. App. B-1), the trial court further elaborated upon its reasons for rejecting

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[2] However, since this was not the only difference between the model proposed by Petitioner and the one adopted by the trial court, it is not possible to tell how much of the reduction in the award to West plant employees was due to this factor.

Petitioner's approach.[3] First, it noted that Petitioner's proposal rested on the unfounded assumption that each class member was impacted equally by Petitioner's discrimination. It found that it was not reasonable to assume that each and every black class member was affected in an identical way. Further, it found that it would be unfair and contrary to the compensatory purpose of Title VII to reduce back pay to demonstrably underpaid class members because some class members were overpaid relative to equally-qualified whites.

On appeal, Petitioner claimed that the trial court had abused its discretion in finding that Shipes satisfied the commonality requirements of Rule 23(a) with respect to employees at the West Plant. The Fifth Circuit held that the district court's determination that the two plants used the same entirely subjective criteria in making employment decisions satisfied the commonality and typicality requirements of Rule 23(a). Noting the wide discretion afforded trial courts in connection with class certification decisions; and noting the fact that the trial court had found that white supervisors applied the same subjective criteria at both plants, that employees were transferred between plants, and that the plants shared administrative forms, employee handbooks, and insurance and retirement systems, the unanimous 5th Circuit panel held that the trial court had "clearly" not abused its discretion in including hourly West plant employees in the class.

By way of cross appeal, Respondents pointed out that, in light of the Supreme Court's intervening decision in *Watson*, *supra*, the district court should have analyzed the case under the disparate impact theory as well as the disparate treatment theory. However, since the appellate court affirmed the trial court on all of the liability issues, including class certification, it did not address this issue.

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[3] As was the case with the trial court's memorandum opinion on liability, Petitioner failed to bring this important order before this Court as an appendix to its petition for certiorari. At the same time, Petitioner faults the trial court for not articulating the reasons behind its decision (Pet. 14-15).

In addressing Petitioner's attack on the backpay remedy, the Fifth Circuit noted the exceeding complexity and uncertainty attendant on the process of fashioning a classwide backpay remedy, and the wide discretion afforded the trial court in this area. It found the trial court's individualized approach to be superior to the classwide remedy advocated by Petitioner, under such well-established Fifth Circuit precedents as *Johnson v. Goodyear Tire and Rubber Co.*, 491 F.2d 1364 (5th Cir., 1974), *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir., 1974), and *United States v. United States Steel Corp.*, 520 F.2d 1043 (5th Cir., 1975), *cert. denied*, 429 U.S. 817 (1976). Contrary to Petitioner's claim that the panel simply affirmed the trial court because it was "daunted by the size of the record in this case" (Pet. 10), the Fifth Circuit opinion indicated that the panel had carefully reviewed the record and the trial court's back pay remedy. The unanimous panel held that the remedy was not clearly erroneous.

ARGUMENT

1. Introduction

Petitioner contends that two questions are presented here: the propriety of an "across-the-board" class action, and the propriety of a damage allocation procedure that arbitrarily excludes some members from receiving damages and gives a windfall to other members of the class.

In fact, neither of these questions are presented on this record. Petitioner phrases both questions in sensational terms, to make it seem that the district court and the unanimous panel of the court of appeals acted in ways that are plainly forbidden by this Court's decisions and by the circuits that have followed those decisions.

The courts below in fact neither approved an "across-the-board" class nor adopted an arbitrary remedy. There is no disagreement among the circuits as to the law that applies to either of these questions. Essentially, the issues involved in this case are fact-bound disputes about how the district court should have exercised its discretion in defining the class and awarding damages, by applying standards about which the lower courts are in general agreement.

2. The class definition

Petitioner contends that, by including the employees at the West Longview plant in the class, the trial court in effect certified an "across-the-board" class action. Petitioner reasons that, since across-the-board class actions were condemned by the Supreme Court in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) the Fifth Circuit's decision affirming the trial court's order must conflict with *Falcon* and with cases in other circuits that have followed *Falcon*.

This argument rests on a fundamental mischaracterization of the trial court's certification order. The practice that was condemned in *Falcon* was that of relaxing the requirements of Rule 23 in Title VII actions. The Supreme Court held that it was error for a trial court to certify a class of people affected by unrelated aspects of the employer's personnel system, on the basis of an unsupported allegation of discrimination only in a particular aspect that system. It held that there must be a showing that the class representative's claim is in fact typical of claims of other class members, in order for a class certification decision to be justified.

Here, the trial court found, after extensive and detailed factual review both of the named plaintiff's individual claims and of the employment systems in place at both plants, that the individual claims were common to and typical of claims of black hourly employees at the West plant. It found that there had been significant proof of a general policy of discrimination at both plants, and that the discrimination was manifested by the entirely subjective decision-making processes in place at both plants. The holding of the Fifth Circuit was simply that tnese factual findings were sufficient to satisfy the commonality and typicality requirements of Rule 23.

The Fifth Circuit's affirmance represents a straightforward, and by now rather commonplace, application of the rules set forth in *Falcon*. The *Falcon* Court was concerned that the across-the-board rule ignored the conceptual gap between a mere claim that an individual had been victimized by discrimination, and the existence of a class of persons who had been victimized in such a way as to make the named

plaintiff's claim common and typical. The error inherent in the practice of certifying class actions based only on an individual's unsupported claim, without a more extensive showing of class-wide harm, was that it gave insufficient consideration to the actual commonality and typicality of the named plaintiff's claims. The Court was careful to point out, however, that class treatment was appropriate in those cases in which commonality and typicality had been demonstrated, as when there was significant proof of a general policy of discrimination, coupled with a showing that the policy manifested itself in different employment practices through entirely subjective decision making processes. *Id.* at 147, 159, n. 15.

Since *Falcon* was decided, the Fifth Circuit has consistently evaluated class certification orders according to its dictates. *See, e.g., Merrill v. Southern Methodist University*, 806 F.2d 600 (5th Cir., 1986); *Vuyanich v. Republic National Bank*, 723 F.2d 1195 (5th Cir.), *cert. denied*, 469 U.S. 1073 (1984); *Redditt v. Mississippi Extended Care Center*, 718 F.2d 1381 (5th Cir., 1983). Certification orders have only been approved in cases where the facts indicated that the named plaintiffs had established the existence of employment practices that adversely affected the class in ways that made their claims common and typical. *See Richardson v. Byrd*, 709 F.2d 1016 (5th Cir.), *cert. denied*, 464 U.S. 1009 (1983); *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608, 617 (5th Cir., 1982).

The Fifth Circuit's rulings in this area are consistent with those of other circuits. *See Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir., 1986); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir.), *cert. denied*, 479 U.S. 883 (1986); *Wagner v. Taylor*, 836 F.2d 578, 590-594 (D.C. Cir., 1987); *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 122-24 (3d Cir. 1985), *aff'd on other grounds*, 482 U.S. 656 (1987). There has been no controversy about the law in this area.

Although the propriety of an "across-the-board" class is not presented in this case, there is a second issue that is lurking in the petition. Petitioner asks this Court to reexamine *Falcon* and to announce a new rule of law: "that a plaintiff cannot meet the requirements of Rule 23(a), and that it is inherent error to certify an

across-the-board class action in a [illegible]rate treatment case, where the employment decisions affecting the plaintiff were made by different supervisors at a different plant than the decisions affecting the other purported class members" (Pet. 11).[4]

Even if the Court chose to adopt this unwarranted restriction on Rule 23 in Title VII cases, it would make no difference to the outcome of this case, in which the plaintiffs proved that Petitioner's entirely subjective employment system at both plants had a disparate impact on black employees there. In *Watson*, *supra*, this Court held that an employer's "undisciplined system of subjective decision making" could be attacked under a disparate impact theory. The impact of a subjective system is not dependent on the identity of the decision maker; it is the system itself that creates common questions. The findings of common practices at both Defendant's Longview plants that resulted in proven discriminatory impact would justify the certification decision here, even if a different rule were to apply in cases that were brought under only a disparate treatment theory.

The rule that Petitioner asks this Court to adopt lacks support in the post-*Falcon* jurisprudence. All but one of the cases cited by Petitioner on this point are cases in which the appellate courts found that the trial courts had not abused their discretion in delineating the scope of various classes, based on the particular facts involved in each case. *See Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566 (11th Cir., 1992); *Giles v. Ireland*, 742 F.2d 1366 (11th Cir., 1984); *Meadows v. Ford Motor Co.*, 510 F.2d 939 (6th Cir., 1975);

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[4] Petitioner does not say whether the Court should permit the certification of such actions when employment decisions are made by different supervisors in the *same* plant. If claims regarding subjective decision-making are inextricably tied to the identities of particular decision makers, it is difficult to see how class claims would ever be appropriate unless the same specific individual made all of the decisions for all of the class members. *See Green v. USX Corporation*, 843 F.2d 1511, 1533 (3d Cir. 1988), *vacated on other grounds*, 490 U.S. 1103 (1989), *aff'd in relevant part after remand*, 896 F.2d 801 (3d Cir.), *cert. denied*, 498 U.S. 814, (1990) (rejecting claim that subjectivity of system precluded class treatment because each employment decision was "unique.").

and *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263 (10th Cir., 1975). The facts of these cases do not resemble those involved in this case, but, even if they did, the findings of no abuse of discretion by the trial courts involved would certainly not conflict with the appellate court's affirmance of the trial court in this case under the same standard of review.

The only case Petitioner cites in which a trial court's decision to certify a class was reversed is *Holsey v. Armour & Co.*, 743 F.2d 199 (4th Cir., 1984), *cert. denied*, 470 U.S. 1028 (1985), a disparate treatment case in which the appeals court found that there was no evidence to support a finding that the officials who made the employment decisions concerning the challenged part of the class were motivated by racial prejudice. *Holsey* involved a challenge to a company's practices in hiring and promoting employees to sales and supervisory jobs. The trial court allowed the named plaintiffs, incumbents who had not been promoted, to represent outside applicants who had not been hired into the positions. The trial court had certified a class based on a finding that the company had applied entirely subjective criteria both to decisions as to whether or not to promote incumbents and as to whether or not to hire outside applicants. The appellate court, calling the question a "close" one, reversed. Since there was no evidence that the officials who made the outside hiring decisions were the same as those who made promotion or transfer decisions, it held that there was no evidence to support a finding that the officials who made the employment decisions concerning the challenged part of the class were motivated by racial prejudice.

In this case, by contrast, there was ample evidence to sustain the trial court's finding that the supervisors at the West plant did engage in racial discrimination in initial placement, pay, and layoff decisions. Indeed, the first two of these findings were unchallenged on appeal, and the third was sustained by the Fifth Circuit. Further, in this case supervisors and managers were transferred between the plants involved. Finally, as noted above, *Holsey* was exclusively a disparate treatment case, while this case also challenged the racially discriminatory impact of Petitioner's decision to leave all employment decisions to the unguided subjective discretion of its all-white supervisory force.

Holsey was decided almost a decade ago, and it has not been followed by a similar holding in the courts of appeal. If it does stand for the proposition that employment discrimination class actions may never cross inter-plant boundaries, it was undercut by this Court's later decision in *Bazemore v. Friday*, 478 U.S. 385, 405-406 (1986). In that case, the Court reversed a Fourth Circuit decision in a case in which the trial court had refused to certify a statewide class. The plaintiffs in *Bazemore* sought to represent a statewide class of black agricultural extension agents employed in different counties, in claims of salary and promotion discrimination, against the statewide agricultural extension service and a proposed defendant class of counties. The district court had refused to certify the plaintiff class, and the Fourth Circuit had affirmed, holding that the counties were largely autonomous in the setting of salaries and the selection of agents for promotion. The Supreme Court reversed the denial of class certification. In an opinion joined by all the members of the Court, it held that, even though individual counties were involved in the setting of salaries and in decisions on promotions, the plaintiffs' claims against the state extension service, a single defendant, were sufficient to create the requisite "typicality." This was so despite the fact, cited by Petitioner (Pet. 11), that practices in each individual county varied enough to make certification of a defendant class of counties inappropriate.

It is *Bazemore*'s holding as to the plaintiff class, not its holding as to the defendant class, that is relevant to this case.[5] There is a single defendant in this case. As regards that defendant, the named plaintiff's

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[5] As *Bazemore* illustrates, different considerations apply to the certification of classes of unrelated defendants than apply to the certification of plaintiff classes against a single defendant. *See also Thompson v. Board of Education, Romeo Community Schools*, 709 F.2d 1200 (6th Cir. 1983); *Paxman v. Campbell*, 612 F.2d 848 (4th Cir., 1980) (*en banc*), *cert. denied sub nom. Henrico County School Board v. Paxman*, 449 U.S. 1129 (1981); and *Henson v. Lincoln County Township*, 814 F.2d 410 (7th Cir., 1987), *cert. dismissed* ___ U.S. ___, 113 S.Ct. 1035 (1993) (holding Rule 23(b)(2) inapplicable to defendant classes).

claims are typical.[6] The discriminatory practices in this case were the result of the failure on the part of the corporate employer to promulgate a set of reasonably objective employment criteria and procedures. Whether Trinity chooses to assign internal blame for this failure to individual plant managers or to persons high on the corporate ladder does not detract from the commonality of the claims of blacks who were discriminated against because of it, any more than variations between counties negated the commonality of the questions of law or fact present in *Bazemore*.

3. The damages issue

The second of Petitioner's "questions presented" is phrased so as to ask the Court to decide whether a court may arbitrarily exclude some members of the class from receiving back pay, while providing a windfall recovery to others. If a court did that, it would plainly be wrong, but that is not what happened in this case.

Rather, Petitioner again simply disagrees with the method that the lower courts adopted for allocating damages in a case in which the underlying violation was the generalized use of wholly subjective criteria for job placement, compensation, promotion, and layoff decisions. According to Petitioner, the lower courts in such cases must calculate the total labor costs for all whites and all blacks, compute the difference, and then award each black worker in the class a share of that difference, regardless of whether that worker personally got less money than he would have received had he been white.

There are three problems with the position that the Petitioner is asking this Court to take. First, there is no disagreement in the lower courts on the question of how damages are to be allocated in a case of this nature. Second, the imposition of a rigid rule on all damage awards in such cases runs counter to the firmly-established proposition that methods of assessing damages in Title VII cases must be flexible. Finally, the rule Petitioner would have this Court propound violates the policy behind the remedy provisions of Title VII, which is to provide make-whole relief only to actual victims of discrimination.

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[6] While the *Bazemore* court phrased its holding in terms of "typicality," it is just as applicable to the question of commonality. As the Court noted in *Falcon, supra*, the two requirements "tend to merge." *Id.* at 158, n.13.

Petitioner does not claim that there is a conflict among the courts of appeal as to the proper method for computing damages in a case of this nature. It merely claims that the Fifth Circuit departed from its own precedent, *Pettway*, *supra*, and *United States v. United States Steel Corp.*, *supra*, in failing to adopt the *pro rata* remedy that Petitioner proposed. Even if the remedy in this case were inconsistent with these cases, such an intra-circuit conflict would be more appropriately resolved by the Fifth Circuit than by this Court. *See Davis v. United States*, 417 U.S. 333, 340 (1974).

The development of a class-wide backpay award is a complex and difficult process, especially where subjective employment systems are involved. *See*, *e.g.*, *Pettway*, *supra*; *Stewart v. General Motors Corp.*, 542 F.2d 445, 452 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977). Decisions involving such remedies are necessarily very fact-intensive and case-specific, and the appellate courts have been reluctant to impose sweeping rules upon the district courts in this area. The most often-cited standards applied by the appellate courts in these cases are (1) that unrealistic exactitude is not required; and (2) that uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer. *Claiborne v. Illinois Central Railroad*, 583 F.2d 143, 149 (5th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979); *Pettway*, *supra*, 494 F.2d at 260-61; *Rios v. Enterprise Association Steamfitters, Local Union 638*, 860 F. 2d 1168, 1176 (2d Cir. 1988). Further, since the district courts are far closer to the facts of the cases than are the appellate courts, they have been granted wide discretion in resolving ambiguities. *United States Steel Corp.*, *supra*, 520 F.2d at 1050; *Stewart*, *supra*.

Thus, *Pettway*, the seminal case in this area, emphasized the flexibility that must be employed in developing a class-wide remedy ("[t]he method of calculating a class-wide back pay award must not be rigid," 494 F.2d at 260), and the case-specific nature of the issues involved. It cited several alternative approaches with approval, but made it clear that the district court was not limited to any one approach (*Id.* at 261-63); *see also United States v. United States Steel Corp.*, *supra* at 1056.

Though Petitioner is correct in pointing out that *pro rata* awards have been approved in some cases, the case-specific nature of each remedy cautions against the automatic application of that approach in every case. The cases in which such relief has been ordered are cases in which it has been necessary to apportion a limited number of vacancies among members of the class who were not hired or who

were denied promotions, each of whom was equally likely to have been placed in the vacancy. *Compare Ingram v. Madison Square Garden*, 709 F.2d 807, 812 (2d Cir.), *cert. denied*, 464 U.S. 937 (1983), and cases cited in the Petition at 15, *with Claiborne, supra.*

This case resembles *Claiborne*, rather than *Ingram* and the other cases cited by Petitioner, in that Petitioner's job categories were fungible, and blacks were assigned to lower-paying categories than equally-qualified whites. In *Claiborne*, the Fifth Circuit, noting that "the details of the approach must vary with the case." *Id.* at 149, rejected a *pro rata* remedy in favor of one which awarded each black claimant back pay for the denial of a position.

It is important to focus on the wrong that the back pay computation was designed to correct in evaluating the remedy the district court adopted. In this case, the *pro rata* approach advocated by Petitioner was properly rejected by the trial court as requiring a clear undercompensation of individuals harmed by Petitioner's discriminatory practices.

The remedy that the trial court adopted for the Petitioner's practice of placing blacks in lower-paying job categories than whites was, in effect, to bring the pay level of each black who was paid less than the average salary of equally-qualified whites up to that level. This is one of the approaches that the *Pettway* court cited with approval. *See also Stamps v. Detroit Edison Co.*, 365 F.Supp. 87, 116 (E.D.Mich. 1973), *rev'd on other grounds sub nom E.E.O.C. v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975) (to remedy the discriminatory assignment of blacks to low opportunity, unskilled jobs, each class member should be paid the difference between his actual earnings and the average earnings of workers in the high opportunity jobs); *United States v. Wood, Wire, & Metal Lathers International Union*, 328 F.Supp. 429 (S.D.N.Y. 1971), *aff'd*, 471 F.2d 408 (2d Cir. 1973) (cited in *Pettway*, 494 F.2d at 262-63) (blacks discriminated against in referrals by a white union hiring hall awarded the difference between the average earnings of white union members, who had been referred, and the claimant's actual earnings). In fact, it is a standard procedure for computing damages in wage discrimination cases. *Rios, supra;*

Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1534 (11th Cir., 1992); *Jepsen v. Florida Board of Regents*, 754 F.2d 924 (11th Cir. 1985); *E.E.O.C. v. Liggett & Myers, Inc.*, 690 F.2d 1072 (4th Cir. 1982); *Love v. Pullman Co.*, 569 F.2d 1074 (10th Cir. 1978); *Danna v. New York Telephone Co.*, 755 F.Supp. 615 (S.D.N.Y. 1991); *E.E.O.C. v. Shelby County*, 707 F.Supp. 969, 987 (W.D.Tenn. 1988); *Younger v. Glamorgan Pipe & Foundry Co.*, 418 F.Supp. 743 (W.D.Va. 1976), *vacated on other grounds*, 561 F.2d 563 (4th Cir. 1977).

The policy behind the remedy of back pay in a Title VII case is to provide make-whole relief to those who have actually been harmed by discrimination. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 579-83 (1984); *Local 28 of Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 474-75 (1986)(Opinion of Brennan, J.). The methodology that Petitioner urged the courts to use does not do this. Instead, in attempting to equalize amounts paid to different racial groupings of workers, it ignores the treatment of individuals. The courts below properly rejected Petitioner's approach in favor of an individualized remedy.

There was no evidence to justify a finding that the few black employees who were paid more than the average for whites with their qualifications were discriminated against in initial placement or pay. However, for the majority of the black employees, who were paid less than the best estimate of what they should have been paid, both the fact of discrimination and the measure of damages is clear. If the award to each of these class members is not equal to the difference between the best estimate of what he should have been paid and his actual wages, then he has not been made whole, and the central purpose of Title VII's remedial provisions has not have been served. *See Segar v. Smith*, 738 F.2d 1249, 1291 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).

The remedy in this case did not depart from the principles set forth by this Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), or by the Fifth Circuit in *U.S. Steel Corp., supra*. These cases stand for the proposition that a court may not deny back pay to an entire class, after a finding that an employer discriminated against the class,

based on such reasons as good faith on the part of the employer, lack of unjust enrichment, or the availability of prospective injunctive relief. These two cases emphatically do not stand for the proposition that each and every member of a class must receive a back pay award, regardless of the circumstances of his or her own treatment at the hands of the employer. As the Court pointed out in *Albemarle*:

> "[w]hether a particular member of the plaintiff class should have been awarded any backpay and, if so, how much, are questions not involved in this review. Though at least *some* [emphasis supplied] of the members of the plaintiff class obviously suffered a loss of wage opportunities...the District Court decided that *no* backpay should be awarded to *anyone* in the class."

422 U.S. at 413.

Similarly, in *United States Steel Corp., supra*, the court of appeals reversed a decision to deny back pay to an entire class of discriminatees. However, as the Petitioner acknowledged (Pet. 14), the court left open the possibility that *some* class members would not receive back pay, if it could be shown that they earned at least as much as comparable whites ("Defendant would have to show convincingly...that a given group of discriminatees outearned, or at least earned as much as, a plant-seniority-comparable group of whites during the discriminatory period," *Id.*, 520 F.2d at 1054).

The district court in this case clearly articulated its criteria for awarding back pay to class members. It used the best available estimate of their individual damages, and awarded damages based on that estimate to class members who could be shown to have suffered economic harm. The Fifth Circuit's affirmance of the remedy is fully consistent with its own precedent and with previous decisions of this

Court.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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No. 93-424

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

TRINITY INDUSTRIES, INC.,
Petitioner,

v.

FOREST HENRY SHIPES, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO BRIEF FOR RESPONDENTS FOREST HENRY SHIPES, ET AL. IN OPPOSITION

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Counsel for Respondents

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IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

NO. TY-80-462-CA

Forest Henry Shipes, et al.,

v.

Trinity Industries, Inc.

MEMORANDUM OPINION

This is a class action under Title VII of the Civil Rights Act, 42 U.S.C. §2000(e) and 42 U.S.C. §1981, wherein the defendant is charged with race discrimination in its employment practices. In addition to the suit itself, six motions are pending, which will be discussed below. The trial was bifurcated into separate liability and relief phases by agreement of the parties.[1]

Trinity Industries manufactures an array of heavy metal products, as well as structural products such as railcars. As of 1983, it operated over thirty production facilities in thirteen states. Plaintiffs' Exhibit 61. Among these facilities were two plants in Longview, Texas, which are the focus of this lawsuit. The first plant, opened in the 1960's, has been referred to throughout the litigation as "Longview West" or "West Plant". The second plant, opened in February 1979, to build railroad hopper cars, is known as "Longview East" or "East Plant". Plaintiffs and defendant have stipulated that defendant is engaged in an "industry affecting commerce" for the purposes of 42 U.S.C. §2000e(g)7(h). Pre-Trial Order, August 26, 1984, Stipulation 4 at p. 37.

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[1] Pre-trial order, August 26, 1984, p. 36.

One named plaintiff[2] has represented a class of all past, present, and future black employees, including salaried employees, at both the East and West Plants from January 10, 1980, to the present. This class was certified on July 29, 1982. The class representative is Forest Henry Shipes, who worked at the East Plant from October 23, 1979,[3] until he was laid off on June 30, 1980. Shipes complains of discrimination in initial placement and pay, pay raises and promotions, and in his lay-off.[4] The class he represents charges discrimination in all of these areas, as well as in the sphere of discharges for cause.

PROCEDURAL HISTORY

On July 10, 1980, ten days after his lay-off, Shipes filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), claiming that he had been discriminated against in job placement, promotion, and lay-off. In his complaint, Shipes alleges that he had been laid off "as a disciplinary measure because I had complained to management about discriminatory wages."[5] Shipes was issued a right to sue notice by the EEOC, on November 25, 1980,[6] and brought this lawsuit on December 16, 1980.

On July 29, 1982, an order was entered which permitted this action to be maintained as a class action. The pre-trial phase of litigation was marked by intense and acrimonious disagreement between the parties. Defendant resisted plaintiffs' attempts to complete diseovery in the face of repeated court orders and impositions of sanctions. On March

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[2] Although the class was originally represented by two named plaintiffs, Forest Henry Shipes and Willie McCoy, the latter was withdrawn by plaintiffs as a named representative. See Order of July 30, 1982, p. 1.

[3] Answers to Interrogatories (Plaintiffs' Exhibit 3).

[4] "Lay-off" refers to a reduction in the work force rather than termination of employment for cause.

[5] Plaintiffs' Exhibit 1-a.

[6] Plaintiffs' Exhibit 1-m.

16, 1984, a hearing was held in which the defendant was ordered to show cause why it should not be held in contempt of court for failure to obey the court's order to respond to interrogatories and furnish documents.[7] Thus, both plaintiffs' motion for sanctions of January 23, 1984, and their motion of March 20, 1984, for further sanctions against the defendant are still pending.

The trial began on November 19, 1984, and ended on December 13, 1984. Plaintiffs submitted post-trial proposed findings of fact and conclusions of law at the end of March 1985, and defendant filed a four volume post-trial brief in early April 1985.

DEFENDANT'S PENDING MOTIONS REGARDING MAINTAINABILITY OF THE ACTION AS A CLASS ACTION

Defendant, by its pre-trial motion of February 21, 1984,[8] seeks to decertify the entire class, based on the change in the law brought about by the decision of the Court of Appeals for the Fifth Circuit in Vuyanich v. Republic National Bank of Dallas, 723 F.2d 1195 (5th Cir. 1984). In its post-trial brief, defendant also urges the court to decertify employees of the West Longview Plant;[9] to decertify the salaried personnel;[10] and to decertify as to those employees who were

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[7] Imposition of sanctions was held in abeyance on defendant's assurance that certain boxes they had brought with them to the hearing represented the discovery they had been ordered to produce. After examining the boxes, plaintiffs filed another motion for sanctions for failure to comply with the court's discovery orders. Plaintiffs' motion for sanction, March 20, 1984.

[8] Defendant previously filed a motion to decertify the class. This motion was denied by order of June 14, 1983.

[9] Defendant's post-trial brief and proposed findings, Vol. II-B, p. 18.

[10] Defendant's post-trial brief and proposed findings, Vol. II-B, p. 27.

[11] Defendant's post-trial brief and proposed findings, Vol. II-B, p. 29

terminated for cause.[11]

The defendant's motion to decertify the entire class because of the decision in Vuyanich may be dealt with briefly. Vuyanich altered the Fifth Circuit's previous policy of granting liberal, "across-the-board"[12] class certifications by requiring that, in most instances, the named class representative " 'possess the same interest and suffer the same injury' as class members." 723 F.2d 1195, 1199. The Fifth Circuit, quoting the Supreme Court's decision in General Telephone Company of the Southwest v. Falcon, 457 U.S. 147, 159, n.15 (1982), also underscored that across-the-board class actions could be maintained in actions where there is "significant proof of a general policy of discrimination...if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." Id. at 1199. In this case, Shipes has claimed the same injuries as the class in initial job placement, promotion, and lay-off. That defendant discriminated against blacks when making terminations for cause is the only class claim not typical of Shipes' own complaints.[13] Clearly, the entire class is not subject to decertification.

The defendant next moves that the class be decertified as to the West Plant. In this respect, defendant argues strenuously that each plant is autonomous, and that since Shipes did not work at Longview West, he should not be permitted to represent its employees. Plaintiffs, on the other hand, point to a series of commonalities between the plants, such as the fact that they had identical insurance and retirement programs and common administrative forms. The two plants used the same Hourly Employee Handbook, which set out basic personnel

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[12] An "across-the-board" class action is one "challenging a wide range of employment practices alleged to result from a common discriminatory origin." In such an action, because of the "Damoclean threat of a racially discriminatory policy hanging over the entire racial group," a class representative may represent a class whose claims of discrimination encompass a wider range of injuries than those he or she claims to have suffered personally. Vuyanich v. Republic National Bank of Dallas, 505 F.Supp. 224, 234 (N.D. Tex. 1980), vacated and remanded, 723 F.2d 1195 (5th Cir. 1984), cert. denied, ___ U.S. ___ (1984).

[13] The defendant has moved separately to decertify the class regarding terminations for cause. That motion will be considered subsequently.

policies employed in both plants regarding wage increases, terminations, and attendance, and outlining the ninety-day probationary period for all employees.[14] From January 1982, until May or June 1984, both plants were under the supervision of a single manager, Charlie Eller. Tr. 272. Since January 1982, both plants have shared the same personnel manager, Jerry Daniels.[15] In addition, job descriptions at the two plants were similar, and a number of job classifications were virtually identical. "[B]oth plants stressed similar aspects of employee performance in determining whether or not they should receive a raise." Defendant's Post-Trial Brief, Vol. III p. 37. A final significant factor is the issue of transfers. Plaintiffs and defendant are in vehement disagreement over whether workers were transferred between the East and West Plants. The practice of transferring workers was mentioned as "persuasive evidence of the coordination of employment practices at the Longview facilities," in the court's July 30, 1982, order certifying West Longview Plant employees as part of the class.

There is no doubt that defendant transferred management personnel

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[14] Plaintiffs' Exhibit 68, Defendant's Exhibit 61.

[15] Tr. 557.

[16] Transfers of managerial personnel that were established at trial were Charlie Eller (transferred from Trinity Plant in Tulsa to the West Longview Plant in 1970; from the West Plant to the East Plant in 1982); Bobby Husted (transferred to East Plant from another Trinity Plant in 1979 [Transcript of the trial (hereafter "Tr.") 816] and to Dallas in 1982); Jerry Daniels, personnel manager (transferred from Dallas to the West Plant in 1974 [Tr. 557] and from the West Plant to the East Plant around January 1982 [Tr. 557]); Steve Randall, superintendent at the East Plant (transferred from the Fort Worth Plant to the East Longview Plant [Tr. 1240]; W. L. Curlee, quality control inspector (transferred to the West Plant, #17, from the East Plant in October, 1982; transferred between plants again on February 1 and April 1, 1983 [Plaintiffs' Exhibit 24e, p. 11]); Gary Schmidt, Maintenance Superintendent (transferred from another Trinity Plant to the East Plant, August 1979, and to a Trinity plant in Channelview in May 1982 [Plaintiffs' Exhibit 24e, p. 1]); Tom Morgan, Foreman (transferred from another Trinity plant to the East Plant in March 1979 [Plaintiffs' Exhibit 24e, p. 3]). In addition, the only black office employee ever employed at the East Plant was an accountant sent from the Dallas office [Tr. 882, Husted direct].

freely between its facilities.[16] Defendant vigorously disputes that there was any policy of transferring hourly employees between the plants. Defendant's Post-Trial Brief, Vol. II-B, pp. 5-12. However, the evidence contained in defendant's own internal documents, produced on request during the course of the EEOC investigation, is more persuasive. For example, when defendant responded to the EEOC request for information following the fact-finding conference held on October 23, 1980, it included a "list of employees transferred to the other plant (twenty-three percent black)." Plaintiffs' Exhibit 1L.[17] The document submitted by defendant to the EEOC included a handwritten note reading "It should be noted that Plant #17 [i.e., the West Longview Plant] was only asking for good quality welders and did not ask for a helper until one month after Shipes was laid off." The document, Exhibit 2 in defendant's response to the EEOC, lists "hire date" and "transfer date" for thirteen employees transferred between June 23, 1980, and July 22, 1980. Exhibit 4 to Defendant's Response to the EEOC consists of Attendance Sheets for all personnel in the Roofing Department (where Shipes worked) at the time that he was laid off. The attendance sheet for David Stout, Employee No. 15333, notes that he was "transferred to other plant." The notes from the EEOC fact-finding conference record Shipes as charging that the defendant racially discriminated in lay-offs by "laying off blacks while transferring whites to the Trinity East [sic] Plant." The defendant's response was that only thirteen employees were transferred, of whom three were black. (Plaintiffs' Exhibit No. 1K.)

Thus, in 1980, before this action was filed, defendant acknowledged that it transferred employees between the plants. There is no new reason advanced by defendant that would justify altering the court's July 30, 1982, order certifying the class to include employees of the West Longview Plant.

The defendant's motion to decertify the class as to salaried personnel has more merit in the wake of the trial. The sole black to testify who was on salary at either Trinity Industries Plant was Ray

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[17] Plaintiffs' Exhibit 1L, which is defendant's November 5, 1980, response to the EEOC request for further information, comprises a letter with five enclosures labelled Exhibits 1 - 5.

Charles Boston, and his wage and promotion complaints concerned the period when he was on hourly wages. Tr. 1109-1111. Almost without exception,[18] the defendant's salaried work force was white at both plants, and no salaried black complained of discrimination as a salaried employee at trial. Hence, the class will be decertified as to salaried personnel. The absence of blacks in salaried positions, of course, can be considered as evidence of defendant's discriminatory practices in job placement and promotion.

Finally, the defendant urges decertification as to blacks dismissed for cause, on the basis that Shipes, who was laid off, cannot represent this class. They also urge that discharges cannot be adjudicated as a class matter since, by their circumstances, they are necessarily individualized.[19] The defendant did not cite any law in support of this latter proposition, and indeed it does not comport with the law. Blacks as a class can be treated disparately with regard to terminations as well as any other aspect of employment. In Lilly v. Harris-Teeter Supermarket, 720 F.2d 326, (4th Cir. 1983) cert denied, ___ U.S. ___, 104 S.Ct. 2154 (1984), the Court of Appeals for the Fourth Circuit affirmed class certification on behalf of terminated employees, noting that "the complaint plainly alleged a practice of disparate treatment in the exercise of unbridled discretion, thus raising questions of law and fact common to all discharged black employees." Id., at 333. In Lilly, however, the class representative had been discharged, unlike Shipes in the present case.

Generally speaking, a class representative must suffer the same injury as the class he represents. General Telephone Company of the Southwest v. Falcon, 457 U.S. 147, 156 (1982). However the Supreme Court explicitly made an exception in cases involving

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[18] Louis Patterson testified that there were no black foremen during his tenure at Longview East, from the time it opened in 1979 until December 1981. Tr. 106, 129. One black man, Jerry Pilot, was promoted to foreman in mid-1983, Plaintiffs' exhibit 24(e), over two years after this litigation was filed. "[A]ctions taken in the face of litigation are equivocal in purpose, motive, and permanence." James v. Stockham Valves & Fittings, 559 F.2d 310, 325 n.18 (5th Cir. 1977). There were never any black foremen at the West Plant. Tr. 567.

[19] Defendant's post-trial brief and proposed findings, Vol. II-A, p. 75.

"significant proof that an employer operated under a general policy of discrimination." A class representative can represent a class including those who had suffered injuries different from his own, if the same "entirely subjective decision-making processes" infected both types of claimed injuries. Id., at 159, n. 15. The Fifth Circuit has recognized the applicability of footnote 15 to certification of classes whose injuries are broader than those of the representative in several cases. Carpenter v. Stephen F. Austin State University, 706 F.2d 608 (5th Cir. 1983), Richardson v. Byrd, 709 F.2d 1016, 1020 (5th Cir.), cert. denied, 104 S.Ct. 527 (1983).

This action fits precisely into the Falcon exception. The crux of plaintiffs' claim is that defendant's decision-making processes were concentrated entirely in the hands of an all-white supervisory force, who were provided little or no guidance and operated under no constraints in their decisions as to job placements, promotions, lay-offs, or discharges. At trial, the plaintiffs organized their presentation and argument consistently around the theme that "the lack of any kind of personnel system resulted in the victimization of the black employees." Tr. 9. As the Fifth Circuit held in approving class certification in Richardson v. Byrd:

> Evidence at the Phase I trial showed that the Sheriff's employment practices were infected by the "entirely subjective decision-making processes" recognized in Falcon as a manifestation of policy whose impact might be sufficient to connect otherwise differently situated persons. The district court found that "[t]he Sheriff's Office had no established seniority or merit system to determine eligibility for transfer of [sic] promotion. Nor did it have written guidelines for promotion or transfers. Instead, promotions and transfers were determined by the supervisors, almost all of whom were male, based largely on subjective factors".... The concerns of Falcon were met when the proof surfaced an accused employment practice that adversely affected her and the certified class of employees and applicants.

709 F.2d 1016, at 1020 (emphasis in original).

The proof at trial was ample to support the contention that almost all employment decisions at Trinity Industries were made on the basis of subjective factors. There were no written guidelines governing lay-offs, and the only written policy regarding dismissals "was a list of 'don'ts' whose violation might or might not be grounds for an indeterminate amount of discipline." Lilly v. Harris-Teeter, id., at 330 (4th Cir. 1983). For example, the defendant's Employee Handbook, used at both plants, warned employees that "the following are considered major infractions which any reasonable adult should know will lead to dismissal: ***(12) Failure to observe any of the company's rules or policies." Defendant's Exhibit 61, p. 25; see also pp. 27, 29-30 (permitting, inter alia, termination of "those who advocate subversive doctrines which, if followed, would be injurious to the balance of the employees, the company, or to the United States Government").

Further, there was some evidence at trial that defendants blurred the lines between lay-off and termination. Greg Jones, a black employee at the West Plant, testified that he was told he was fired, but was listed in defendant's records as having been laid off. Tr. 803. Thus, no grounds are found to alter the original class in this respect. The class will continue to include blacks discharged from defendant's Longview plants, as well as those who were laid off.

Finally, the defendant appears to question the court's jurisdiction to hear this action as a class action. The basis for this argument is defendant's contention that the class action "goes far beyond the scope of the E.E.O.C. charge and investigation." Defendant's Post-Trial Brief, Vol. I, p. 18 n.7. In particular, defendant points to the fact that the "E.E.O.C. limited its investigation to Shipes' individual claims." Id., p. 18. Defendant's argument is almost identical to that rejected by the Court of Appeals for the Fifth Circuit in Fellows v. Universal Restaurants, Inc., 701 F.2d 447 (5th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 102 (1983). In that case the Fifth Circuit reversed a district court's decision that it had no jurisdiction over a class action because the plaintiff, Fellows, had not included class allegations in her initial charge with the EEOC, and the EEOC had not investigated any charges on a class-wide basis. The Fifth Circuit held that

> a dismissal for lack of jurisdiction is inappropriate because a non-frivolous federal question was presented that requires the exercise of jurisdiction by the district court.

Id. at 448.

The court also found that Fellows' claim that she was paid less, denied promotion, and discharged " 'because of my sex, female',...could equally be understood to complain of discriminatory employment treatment of all women and...clearly [met] the Sanchez-Gamble[20] test, in our opinion." Id. at 451. Shipes' EEOC charge that "I believe I have been discriminated against because of my race, black," Plaintiff's Exhibit 1(a), uses language very similar to that employed by Fellows. The court in Fellows further noted that the EEOC has adopted a policy of limiting its investigations to the charging party without intending to affect the charging party's right to bring a class action suit. Id. at 452; see also Walls v. Mississippi State Department of Public Welfare, 730 F.2d 306, 318 (5th Cir. 1984).

Finally, it is salient that other attempts to transform Title VII's technical requirements into jurisdictional barriers have not met with favor, see, e.g., Zipes v. Transworld Airlines, 455 U.S. 385, 398 (1982) (failure to comply with filing period requirement does not

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[20] Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970), established that the reach of judicial action arising out of an EEOC complaint need not be confined to the literal EEOC complaint but may extend to "the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." 431 F.2d at 466. Gamble v. Birmingham Southern Railroad Co., 514 F.2d 678, 689 (5th Cir. 1975), reaffirmed the Sanchez test, noting that complainants should not lose the protection they are entitled to under Title VII "because they are ignorant of or unable to thoroughly describe the discriminatory practices to which they are subjected."

destroy jurisdiction). Accordingly, it is held that this court has jurisdiction to entertain the class claims in this litigation.

PLAINTIFFS' PENDING MOTIONS TO ENLARGE THE SCOPE OF THE CLASS AND FOR SANCTIONS

1. Plaintiffs' Motion to Enlarge the Scope of the Class

In its order of July 30, 1982, plaintiffs' class, as certified, included "all past, present and prospective black employees...since January 10, 1980." Order of July 30, 1982, p. 36. Plaintiffs moved on May 3, 1983, to redefine the scope of the class to include black employees since December 16, 1978. While the plaintiff correctly argued that the 180-day limitation of Title VII was inapplicable to claims brought under 42 U.S.C. §1981, and therefore contended that the class period should begin on December 16, 1978, to reflect the two year period permissible under the latter statute, the court was troubled about potential prejudice to the defendant. At the time the motion was filed, it was "on the very eve of trial," and plaintiffs had made no effort to show "that further discovery would be unnecessary, or that no additional burdens upon the defendant would be imposed at this late date." Order of June 14, 1983, p. 7. The motion was thus denied without prejudice on June 14, 1983. On May 7, 1984, the plaintiffs refiled their motion. Since the motion was pending at the time of trial, the case went to trial with the scope of the class unchanged. Hence, the only manner in which plaintiffs' motion to expand the scope of the class could be granted at this time—without prejudicing the defendant severely—is if evidence supporting such an expanded class was presented and fully litigated at trial by express or implied consent of the parties. Rule 15(b), F.R.Civ.P.

At trial plaintiffs and defendant presented some evidence as to defendant's employment practices in 1979, but only with regard to employees who were still employed by Trinity Industries in 1980. This would exclude many short-term employees in 1979. East Plant Production Manager Steve Randall testified that the employment situation at the plant "was like a revolving door," Tr., p. 1119. In fact, plaintiffs based many of their criticisms of defendant's statistical models on the fact that the models did not take short-term employees into account. See, e.g., Tr., pp. 89, 91. Therefore, it is determined that

insufficient evidence was presented at trial to justify altering the date of class membership. Accordingly, plaintiffs' motion to expand the scope of the class will be denied.

2. Plaintiffs' Motion for Sanctions

Plaintiffs' motions of January 23, 1984, and March 20, 1984, for sanctions against defendant for its abuse of the discovery process, are also outstanding. Plaintiffs' motions for sanctions constitute the second and third such motions in this case. The history of defendant's behavior in this case was chronicled in a previous order of this court:

> [P]laintiff has been moved to file twelve motions to compel over a three year period, all of which have been granted. Six orders, including the instant one, have been issued compelling discovery, and plaintiff's costs in obtaining those orders have been assessed against Trinity at least three times. Plaintiff has moved for sanctions a minimum of three times; a show cause hearing was held concerning [the second] motion, and a ruling has been postponed until after trial. [Footnote omitted.]

Order of June 5, 1984, p. 8.

The pending motion in this case was filled after defendant appeared at a hearing on March 16, 1984, which was held in order that defendant might show cause why it should not be held in contempt for failure to comply with the court's discovery orders. At that hearing, defendant appeared with boxes which it represented contained all the outstanding discovery it had been ordered to produce. The court held the motion for sanctions in abeyance. Subsequent to plaintiffs' examination of the contents of the boxes, they filed the March 20, 1984, motion for sanctions. Defendant's conduct has been characterized by this court as "intractable", Order of February 12, 1982; "recalcitrant", Order of March 5, 1984; "indifferent and disrespectful to established rules of procedure," Order of November 24, 1981; "obstinately disobedient," Order of February 12, 1982, and "a perversion of even the most extreme conception of spirited advocacy," Order of June 5, 1984, effective May 11, 1984. The court has already determined that the box

produced at the March 16, 1984, hearing did not represent most of the outstanding discovery. Order of September 12, 1984, p. 1. The attorney for defendant was disingenuous in his representations to the court that he had complied with the court's orders, when he claimed that the box satisfied those orders.

Federal Rule of Civil Procedure 37(b) authorizes sanctions for failure to comply with discovery orders. Both parties and counsel may be held personally liable for expenses, "including attorney's fees," caused by the failure to comply with discovery orders. Rule 37 sanctions must be applied diligently both "to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent." Roadway Express Inc. v. Piper, 447 U.S. 752, 764 (1980). See also Carson v. Polley, 689 F.2d 562, 586 (5th Cir. 1982) (approving sanctions of $3,899.70).

A hearing was held on March 16, 1984, to give defendant's attorney an opportunity to show cause why sanctions should not be imposed. It appears that at that very hearing, the attorney misrepresented the facts in open court. Accordingly, the plaintiffs' January 23, 1984, and March 20, 1984, motions for sanctions will be GRANTED against defendant's lead counsel, personally. Robert Rader, Esquire, then lead counsel in this action for defendant, is ORDERED to pay $3,000.00 to the plaintiffs' counsel as a sanction.

A. INITIAL PLACEMENT AND PAY

Plaintiffs claim that defendant discriminated against blacks in hiring by placing them into lower-paying positions that required less skill than the positions to which similarly qualified whites were placed. This discrimination in initial assignment was, according to plaintiffs' allegations, the result of a hiring process unfettered by written procedures, regulations, or even consistent habits. In this respect, plaintiffs charged that the process of hiring often involved

assigning a job classification and pay level based on the preferences of the personnel director or foreman, rather than requiring that the applicant meet formal, predetermined requirements of a specific job vacancy.

The majority of workers at both plants were employed as welders or welder's helpers (also known as "fabrication helpers").[21] The defendant's job classifications in this area, including the lowest to the highest hourly levels of pay, and—allegedly—skill, were as follows:

	Pay Ranges (East)[22]
Welder's Helper C	$5.10 - $6.00
Welder's Helper B	$5.10 - $6.00
Welder's Helper A	$5.10 - $6.00
Welder C 1 and 2	$6.38 - $8.08
Welder B 1 and 2	$6.38 - $8.08
Welder A 1 and 2	$6.38 - $8.08

The plaintiffs contend that blacks who were qualified to be welders were hired as welder's helpers, while less qualified whites were contemporaneously hired as welders. Moreover, plaintiffs attack the job classification system itself, claiming that the job descriptions were so vague as to be essentially non-descriptive, giving foremen great latitude in assigning employees to one category rather than another. Plaintiffs also claim that the entire hierarchy bore no relation to the reality at the plants, where welder's helpers and welders did essentially similar work. Finally, the plaintiffs maintain that the written job classification system, such as it was, was not even in existence for most of the time covered by this lawsuit, but was tardily devised to convey an impression of objectivity to the court.

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[21] Although defendant stipulated in the pre-trial order that a welder's helper and a fabricator's helper were different names for the same job, pre-trial order, August 26, 1984, p. 39, it is interesting to note that Steve Randall, one of defendant's chief witnesses, considered the two names to describe separate distinct jobs. Tr. 1225. This reflects a confusion over which job titles applied to which duties. This vagueness is evident throughout the record, see, e.g. n. 31, infra, and serves to reemphasize the tenuous connection between job titles and descriptions when contrasted to the actual work performed at the plant.

[22] As of December 14, 1981 — See Plaintiffs' Exhibit 3(b).

The plaintiffs support most of these contentions with impressive statistical evidence, an abundance of anecdotal testimony, and with the written and oral testimony and evidence submitted by defendant itself. The defendant argues that the job descriptions were in place prior to the litigation, that the job descriptions were objective and detailed, and that, because they were constrained by the job descriptions, both the personnel director and the foreman hired employees in accordance with an applicant's skill level. Defendant also denies that blacks were channeled consistently into lower-paying jobs.

EXISTENCE OF THE JOB DESCRIPTIONS

The plaintiffs' argument that the job descriptions were hastily put together at the last minute is based on the fact that defendant informed the EEOC that "we have no job classification system other than by job title." (Plaintiffs' Exhibit 1-E.) Plaintiffs also point to the defendant's response when job descriptions were requested during the course of discovery. There defendant replied that, at the East Plant, "no documents can be located at this time," and that, at the West Plant, there were "none." (Plaintiffs' Exhibits 8B and 8C.) These responses, plaintiffs insist, demonstrate that indeed no job descriptions were developed at the time of the discovery in question. Defendant's witnesses testified that the job descriptions for the East Plant were prepared by Bobby Husted, the East Plant manager, Louis Patterson, its personnel manager, and various supervisors at the time the plant first started up in 1979, and before the hiring of any workers. Tr. 315. Further, defendant's witnesses testified that the West Plant job descriptions were developed by Charlie Eller, the plant manager, in the latter part of 1974 or early 1975. Eller testified that he "drew them up the way I felt they should be."[23] Defendant made no attempt at trial or in its post-trial brief to explain the discrepancy between its responses to the EEOC and to plaintiffs and its later explanation of how the job descriptions were developed.

The court is inclined to believe that the job descriptions did exist

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[23] Defendant's post-trial brief and proposed findings, Vol. I, p. 5; Plaintiffs' exhibit 96, p. 42.

throughout the time in question. If these job descriptions had been prepared in anticipation of litigation, they would doubtless have been far more objective, detailed, and specific than the descriptions submitted, which are so vague, and to a great extent, so meaningless, that it is not credible that they were prepared to stave off legal liability. Moreover, defendant throughout this litigation has displayed the utmost reluctance to part with relevant information.[24] It seems perfectly conceivable that defendant's response to the EEOC and to plaintiffs was simply another incident illustrative of its "stonewalling" strategy, described by the court as "[defendant's] intractable posture of obstinate disobedience." Order, February 12, 1984.

SPECIFICITY OF THE JOB DESCRIPTIONS

The fact that the job descriptions were in place is not a major assistance to defendant. These job descriptions were used at the East Plant both for initial hiring and placement and for promotions.[25] The West Plant's descriptions were used only for hiring. Plaintiff's Exhibit 96, pp. 23, 44. The job descriptions for welders and welder's helpers, which are among the most detailed, would be of little assistance to a person attempting, in good faith, to make a job placement decision. The job descriptions are a key point in plaintiffs' argument that defendant gave Louis Patterson and Jerry Daniels, the personnel directors of the East and West Plants, respectively, too much discretion in assigning an applicant to a job. The defendant defends the descriptions, contending that they were sufficiently specific and objective to limit the discretion of the personnel managers. Because of the significance of the job descriptions to the initial placement claim, they will be reproduced below, verbatim:

EAST PLANT

Fabrication Helper:

C = No previous experience required. Must possess physical

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[24] The court has had previous occasion to describe the discovery history of this case as "tortured", Order, March 5, 1984, p. 2. This order recounted the three orders by this court to compel production from defendants, culminating in a contempt hearing on March 16, 1984. See pp. 16-18, supra.

[25] Plaintiffs' exhibit 11b, Tr. 152.

and mental ability to do assigned tasks. Ability to read simple measuring devices. Assigned duties may vary (grinding, cleaning, tac weld, etc.)

B = Individual has ability to Tac Weld or grind with minimum of supervision. He has shown initiative to learn. Good attendance. Variable duties including grinding, tac welding etc. Has demonstrated good safe work habits. Adequate experience and satisfactory performance at previous level.

A = Makes good solid tac weld with occasional long continuous weld of fair quality. Minimum of supervision. Carries out assigned duties quickly and correctly. Adequate experience and satisfactory performance at previous level.

Welder:

Class C - Step 1 - The ability to make good sound flat welds with either automatic, rods, or wire gun. Proper use of hand tools and measuring devices. Safe work habits. Adequate experience and satisfactory performance at previous level.

Step 2 - Has demonstrated good attendance and productivity. Ability to fit materials in jigs without difficulty. A good demonstration of initiative and motivation. Some use of a cutting torch. Adequate experience and satisfactory performance at previous level.

Class B - Step 1 - General knowledge of a combination of 2 types of welding, either rod, wire, or automatic. Six months to one year experience with another employer with a good recommendation. Work is of a good quality with a minimum of re-work. He is capable of doing re-work. Fair with a cutting torch and overhead crane. Adequate experience and satisfactory performance at previous level.

Step 2 - Has ability to train other employees in correct

welding practices and safe work habits. Work is of good quality. Adequate experience and satisfactory performance at previous level.

Class A - Step 1 - Has above average quality production, attendance and attitude. None of his work requires re-working. May have 2 or more years experience in another plant with good recommendation. Has ability to perform duties of more than one job location and ability to weld in all positions. Ability to work from blue prints. Adequate experience and satisfactory performance at previous level.

Step 2 - Must be able to work with no supervision and has demonstrated superior productivity and potential for leadership. Can perform duties of more than on location. Adequate experience and satisfactory performance at previous levels.

These job descriptions are heavily interlarded with subjective criteria. Even assuming criteria such as initiative and motivation were, or could be, applied absolutely fairly, they are obviously of limited assistance when initially hiring an individual. In addition, the attributes that may be characterized as subjective or attitudinal vary arbitrarily from category to category.[26] A measure of the objectivity and usefulness of the description is the ability to compare it to an

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[26] For example, a fabrication helper B, and a Welder C, Step 2, must show "initiative." This is not an attribute mentioned in any other category. A fabrication helper B, a Welder C, Step 1, and a Welder B, Step 2 must have "safe work habits." This is not mentioned in any other category. "Good attendance" is a requirement for Fabrication helper B, and a Welder A, Step 1. This is not mentioned in any other category. Only a fabrication helper A is specifically required to be a person who "carries out assigned duties quickly and correctly"; and only a Class C, Step 2 Welder has a "motivation" requirement. "Productivity" is mentioned for Class C, Step 2 Welders, and Class A, Step 2 Welders.

[27] " 'Tack [sic] welding' " is a very short weld. It's just enough to hold two pieces together until someone else can come along and weld behind them and make a solid weld on it." Tr. 354-55.

individual's capabilities and work assignments and thereby discern whether he was properly placed. The more objective aspects of the fabrication helper job descriptions make few distinctions between categories. A Class C fabrication helper does grinding and tack welding,[27] as do Class B and Class A fabrication helpers. Class C fabrication helpers' "assigned duties may vary" while Class B fabrication helpers have "variable duties." Within the welder category, the job descriptions are somewhat more helpful, although still erratic. A Class C-1 welder must have "the ability to make good, sound flat welds with either automatic, rods, or wire gun." A Class B-1 welder must be able to do two of those three types of welding. A Class A-1 welder must have the "ability to work in all positions." A Welder C-2 requires "some use of a cutting torch;" Class B-1 requires an individual to be "fair with a cutting torch and overhead crane." An A-1 welder must be able to "work from blueprints."

The job descriptions at the West Plant are even more spare:

FITTER OR WELDER

Class A - Fitter or Welder that can perform efficiently in four [4] or more stations, with above average quality.

Class B - Fitter or Welder with somewhat lower efficiency that can work [4] or more stations with average quality.

Class C - Fitter or Welder [trainee] training in one or more operations working less efficiently and producing below average, but acceptable work. Requires more supervision.

Helper Employee does no welding or fitting, runs grinder, sweeps, janitor, etc.

Plaintiff's Exhibit 15b; Defendant's Exhibit 60.

These "descriptions" would obviously be of little or no help in hiring a job applicant and amount to no description whatever for placement

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[27] Defendant's Exhibit 60, Plaintiffs' Exhibit 15(b).

purposes.

It should be noted that job descriptions at both the East and West Plants did not cover all the jobs at either plant. Tr. 126-27. At the West Plant, only five jobs were described at all.[28] At the East Plant, the category of General and Mechanic Maintenance had no written description of any kind, beyond setting out nine levels from A-3 to C-1 and trainee.[29] The job descriptions for welders and helpers, vague as they are, are among the most detailed for both plants.[30]

Although it can be concluded intuitively that the job descriptions are flawed, the plaintiffs presented the credible testimony of an expert witness to flesh out their inadequacies. Dr. William Howell, an expert in industrial organizational psychology, noted that the job descriptions did not actually describe the job, but were, instead, a mixture of qualifications and appraisal criteria: "They are all mixed up so that a particular item may have more of the appraisal material and less of the descriptive material...it's just confusing." Tr. 918-19. Noting, as any non-expert could, that the descriptions were ambiguous, vague, and unspecific, Tr. 919, he ultimately focused on the fact that Trinity East descriptions were used both to promote individuals and to hire them, as one of the chief sources of their flaws. Tr. 920.

APPLICABILITY OF THE JOB DESCRIPTIONS

It is clear that the paper hierarchy broke down in practice. In at least some of the departments at Trinity East, there was little distinction

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[29] Plaintiffs' exhibit 15a and Defendant's exhibit 59.

[30] Plaintiffs' exhibits 15a and 15b and defendant's exhibits 59 and 60.

[31] Plaintiffs' witness Andrew Scott, on the other hand, was employed in the finishing department, and testified that there was a distinction between grinders, welder's helpers, and welders. Tr. 1034. Scott testified that grinders, such as himself, always did only grinding work, while welder's helpers assisted the welders in welding. Interestingly, the defendant contradicts Scott, claiming there is no difference between a grinder and a welder's helper. Defendant's pre-trial brief, Vol. I, p. 71. Defendant's witness, Tom Fleming, also testified there was no difference between a welder's helper and a grinder. Tr. 1517.

in the work done by welders and welder's helpers. Plaintiff Shipes testified that in the Roofing Department, where he worked, each employee did his own tacking, grinding, and welding. Tr. 39, 41, 48. This testimony was supported by that of Ray Charles Boston, who also worked in the Roofing Department. Tr. 1115-1116.[31] Another witness, Frank Harvey, testified that everyone was doing "more or less the same job." Tr. 619-20. Harvey worked in the Fabrication Department. Tr. 617. Steve Randall, defendant's assistant plant supervisor, conceded that welder's helpers would "occasionally" do welders' work. Tr. 1278-79. Tom Fleming, a foreman at Trinity East and another defense witness, also acknowledged that there were helpers who did "mainly welding", Tr. 1533, and that there were welders who did their own tacking and grinding. Tr. 1533-34. Fleming testified that a helper might start doing C class welder work from his first day on the job. Tr. 1535. Defendant's explanation that helpers had to learn how to weld in order to be promoted to a welder's position, Tr. 361-362, 418, is belied by its response, in September 1980, to an EEOC inquiry about its job classification system:

> We have no job classification system other than by job title. There are four welder classifications: Welder A (1 and 2), Welder B (1 and 2), Welder C (1 and 2), and Helper (A, B, C). There is some difference in work performed but mainly it is a difference in pay rate.

Plaintiffs' Exhibit 1(e) (emphasis added).

Thus, it is concluded that, in many of the defendant's departments at Longview East, the job categories were meaningless as descriptions of the work employees actually performed. Welders did their own tacking and grinding, and welder's helpers did welder's work. Management was well aware of this actuality. Plaintiffs' Exhibit 1(e), supra. But "the official title was what [was] used to set the salary." Tr. 162. The highest welder's helpers' wage rates were forty to fifty cents an hour lower than the lowest welders' hourly wage. In Defendant's Answers to Plaintiff's Interrogatories, filed December 14, 1981, the pay range at the East Plant at that time is listed as $5.10 to $6.00 for a fabrication helper and $6.38 to $8.08 for a welder.

At Longview West, the situation was the same. The West Plant

had no written pay ranges. Jerry Daniels, the personnel manager, conceded at trial that: "[T]he A, B, and C level, say within welder, were basically a pay rate classification, rather than a categorization of the kind of work that was performed in those different classes." Tr. 574. There was, however, no evidence from the individual witnesses who had worked at the West Plant that pointed to discrimination in initial placement or pay. All of the past and present black employees of the West Plant who testified at the trial had been or were welders. There was no testimony that qualified blacks were told at the West Plant that only helper's jobs were open.

DEFENDANT'S HIRING PROCEDURES

The process by which an employee was hired and placed is analytically dichotomous: on the one hand, the system that was apparently envisioned by the defendant, and on the other, the day-to-day realities. As with the job descriptions, the hiring and placement processes would have been highly subjective, even if they had operated as defendant described.

Defendant did not post notices of job vacancies in either plant. Pre-Trial Stipulation 14, Tr. 117, 595. In both plants, an applicant would normally be furnished with an employment application form by a receptionist. The form included basic information, such as name, address, date of application, as well as the job applied for, salary desired and educational and employment history. A section was blocked off for company use that included spaces for personal interview notes, departmental interview notes, department and position hired for, starting date, and salary.

The defendant maintains that the applicant was then interviewed by the personnel director at the respective plants, namely, Louis Patterson at the East Plant until December 1981, and Jerry Daniels at the East Plant thereafter; Jerry Daniels at the West Plant from 1974 to the time of trial. Patterson testified that, in the interview, he inquired about the applicant's education, Tr. 138, past experience, and qualifications. Tr. 348. Although Patterson did not use written notes or follow a checklist, he claimed that he had memorized a certain interview format which he followed with each applicant. Tr. 119-120.

After the interview, Patterson testified, he would determine which job an individual was most likely suited for by matching the individual's application, interview, and reference check with the job descriptions. Tr. 117. The applicant would then be taken out to meet the foreman for the position for which he was being considered. Tr. 121. If he were being considered for a welder's position, the foreman would administer a test. At this point, defendant contends, the applicant would be accepted or rejected for the position, the decision being a joint one by the personnel director and the foreman. Tr. 118, 137-38. Patterson also claimed that he conducted an orientation for each new employee, either individually or as part of a group. Patterson admitted that he did follow a checklist when conducting such orientations.

But regardless of whether the process worked precisely as described by defendant, it would, nonetheless, be vulnerable to the danger of eventuating into a subjective, informal system. The screening and initial choice of placement for an applicant at the East Plant was entirely up to Patterson, who determined which of his available openings were appropriate for the individual, based on factors such as education, Tr. 149, Tr. 331, and attitude, Tr. 147. Patterson conceded that education had never been validated as an appropriate index to an employee's future performance in any of the jobs. Tr. 138. He could make judgments on a person's attitude, Patterson explained, "based on the way the person answers the questions, based on his general—I hate to say attitude again, but the way he responds to questions, the way he answers, the way he conducts himself in general during the interview." Tr. 153. Patterson testified that an applicant's attitude had "a direct bearing" on his placement decision, and stated that applicants with bad attitudes would not be considered for a job:

> I've had, on various occasions, employees that come in that would be totally disrespectful. They would—I don't know why, but it would appear that they were angry when they came in and fill out an application, like they're angry at the world or something, and if you've got a person that demonstrates a poor attitude or poor conduct when he's coming in and applying for a job, then, yes, it has a definite bearing and that person would not be considered for a job.

Tr. 153-154.

Besides the amorphous requirement of a good attitude, there is evidence of what additional factors Patterson or the foreman considered significant in making employment decisions. These are contained in the notes that were occasionally made on applications for employment, e.g., Homer Pilot, who was applying to be a welder: "Looks good — Taking night college two days a week." Defendant's Exhibit 36a. Patterson thus performed unreviewed evaluations, following unhelpful job descriptions, and applying unvalidated criteria. Tr. 138. Even if the process was entirely as defendant described it, the potential for any preexisting discriminatory tendencies to manifest themselves is obvious. It was hypothesized to Albert Davis, an employee at the East Plant and one of defendant's witnesses, that one day after he was told only helper's jobs were available, whites with less experience than his were hired into jobs that paid higher wages. When asked about his feelings regarding the hypothesis, he summarized the situation which blacks found at Trinity Industries with unconscious poignancy:

> All they had for me at the time they hired me, they told me. I accepted the job, but then if they hired men in the next day to fit everything up, wasn't nothing I could do about it. Wasn't nothing I could say about it. I didn't have to take the job.

Tr. 1500.

Regarding the West Plant's interviewing and selection process, even defendant admits that, "procedures for initial placement at the West Longview Plant must be pieced together...." Defendant's Post-Trial Brief, Vol. I, p. 20. The procedures used at the West Plant appear to have been substantially identical to those at the East Plant. The personnel director at the West Plant, Jerry Daniels, testified that there were no "specific minimum requirements of education, experience, or vocational training for any of [the] jobs." Tr. 579. He himself made the decision concerning what weight to give each factor for any particular applicant. Id. The applicant's foreman decided what the applicant would be paid, but within a range unspecified in the evidence. Tr. 575, 585. In keeping with the West Plant's inchoate job descriptions, the hiring process at the West Plant was characterized even by the defendant itself as rather free-form. Tr. 577-80. Nevertheless, Daniels himself appeared at trial to be a person of

genuine good intention and good faith, unlike Patterson, who appeared to be evasive and insincere. Interestingly, plaintiffs' statistics bear out that the difference in initial pay between whites and blacks at the West Plant, while significant, was less than the difference at the East Plant.

When compared with reality, the seemingly more formal hiring procedures at the East Plant break down into arbitrariness. Some applicants were hired without being interviewed. Tr. 487 (Homer Pilot); Tr. 730 (Arthur Holley); Tr. 1020 (Andrew Scott). Many of the plaintiffs' witnesses credibly testified that Patterson did not inquire into their experience at all. Tr. 36 (Shipes); Tr. 1020 (Andrew Scott). Both plaintiffs' and defendant's black witnesses repeatedly testified that Patterson told them that only fabrication helper's jobs were available, or only custodial or janitorial jobs were to be had. Tr. 35 (Shipes); Tr. 616 (Frank Harvey); Tr. 707 (Leander Blair); Tr. 1020 (Andrew Scott); Tr. 1060 (Willie Jones); Tr. 1495 (Albert Davis).

Using Forest Henry Shipes as an example, plaintiffs demonstrated that defendant hired more-qualified blacks into lower-paying positions than less-qualified whites. (This is documented in detail in the section relating to Shipes' individual claim.) It is also noted that defendant apparently violated its own facially sparse guidelines by hiring Ray Charles Boston as a "C" class welder. Boston's application showed almost six years of experience as a welder. He specifically denominated his experience as "A-Class Welder" for over four of those years, and indicated that his salary level had been $7.25 per hour. The blanks on his application for interview notes were left empty; all that is written is that he was hired as a "C' class welder at $5.35 per hour. Defendant's Exhibit 38(a). It may be added that at trial Boston presented an exceptionally credible and impressive demeanor.

Plaintiffs also presented convincing testimony that the welding tests were administered in so random a fashion as to be meaningless. There was no uniform test procedure, Tr. 184-85, 592; the foremen merely checked the sample weld visually rather than administering a stress test, Tr. 183, 593; applicants were tested on different apparatus than they used in their jobs, Tr. 488-89; and few records were kept of

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[32] At the East Plant, some records of tests were kept beginning in August 1981. Only thirty-two records of welding tests could be found for the period from August 1981, forward. Plaintiffs' Exhibit 16.

results of the tests.[32] Many black witnesses also testified that they trained whites who were hired as welders and who were paid more than they were. Tr. 493. Blacks at the East Plant complained that an atmosphere of racial tension existed at the plant. Tr. 496, 621.

Finally, plaintiffs presented a variety of statistical analyses as proof of their claim that blacks were generally assigned into lower-paying jobs than whites at both plants, including a simple static workforce analysis, a comparison analysis of starting wages for blacks and whites possessing the same qualifications, and sophisticated multiple regression analyses.[33] The latter two analyses confirmed that there were significant disparities in starting pay between equally qualified blacks and whites.

The static workforce analysis showed the absence of blacks in the highest paying jobs at each plant. Indeed, in the two highest paying jobs at the East Plant, Leader and Burner, no blacks whatever had ever been employed. The same was true for the highest paying job at the West Plant, Maintenance.[34] The lowest paying job at the East Plant was janitor; the overwhelming number of janitors were black. Plaintiffs' Exhibits 67a and b. See Defendant's Exhibit 26.[35] There has never been a black foreman at the West Plant, and only one black was ever made foreman at the East Plant. This individual was promoted to foreman in May 1983, over two years after this action was filed. See n. 18, supra.

The plaintiffs then grouped together black and whites by individual qualification, e.g., completion of high school, trade school instruction,

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[33] Multiple regression is a statistical technique for making quantitative estimates of the effects of several independent factors on a single dependent variable. Fisher, "Multiple Regression in Legal Proceedings," 80 Columbia Law Review 702 (1980).

[34] Plaintiffs' claim that the second highest paying job at the West Plant was burner; no black was ever employed at the West Plant as a burner. Defendant contends that welders at the West Plant were the second highest paid and that burners were third highest paid. Because no evidence was presented regarding bases for determining job rankings, only those on which plaintiffs and defendant agree will be considered.

[35] The page which is marked for court records as defendant's exhibit 26 is entitled exhibit 27.

prior work for Trinity, welding experience, military training, prior supervisory experience, etc. In each category, blacks were assigned considerably less starting pay then whites. In seventeen cases, the probability that the disparities between initial pay for blacks and initial pay for whites were due to chance was less than one in 1,000;[36] in fact, out of twenty-two categories the largest probability observed was .004.[37] Plaintiffs also compared a homogenous group of East Plant employees, each of whom had a high school diploma or General Equivalency Diploma ("G.E.D."), but no previous Trinity experience, no college or trade school instruction, no military training, and no supervisory experience, and who were unemployed when they applied. Blacks in this group received an average adjusted starting pay[38] of $6.00, while whites with the same characteristics received an average adjusted starting pay of $6.56. The probability of observing this result by chance was .000, i.e., less than one in 1,000.

The results at the West Plant followed the same general pattern, but were not so strikingly uniform in their adverse impact on blacks. Of the twenty-two groupings by qualifications, sixteen contained at least ten blacks and ten whites.[39] Of these sixteen, eleven showed a

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[36] Plaintiffs' Exhibit 34.

[37] This was observed in the category of employees who already had jobs elsewhere when they applied for work at Trinity's East Plant, which means that there was a chance of 4 in 1,000 that such a difference in starting pay would be observed in a racially neutral environment.

[38] The plaintiffs adjusted each employee's starting pay to take into account general plant wage increases that occurred after his hire date. Therefore, starting salaries were not skewed by reason of the fact that a person had been hired at an earlier time when the general wage levels were lower. See Plaintiffs' Exhibit 33.

[39] Numbers smaller than these tend to produce less reliable results. Tr. 1759. D. Baldus and J. Cole, Statistical Proof of Discrimination, §9.221, at 309 (1980).

[40] A probability value of .05 or below is generally considered to be statistically significant, i.e., when there is less than a 5% probability that the disparity was due to chance. For large samples, statistical significance at a level in the range below 0.05 or .01 is "essentially equivalent" to significance at the 2 or 3 standard deviation level. D. Baldus and J. Cole, Statistical Proof of Discrimination, §9.03 at 297 (1980).

statistically significant[40] disparity adverse to blacks.

Defendant criticized these tests because they did not simultaneously control for all potential qualifications. This criticism would have been particularly potent, if plaintiffs had chosen to rely solely on these wage comparisons. However, plaintiffs also conducted a multiple regression analysis which did control simultaneously for all variables, and which confirmed that a statistically significant difference in starting pay adverse to blacks actually existed. Thus, the plaintiffs' wage comparisons—which could not stand alone—provide significant corroboration and support for plaintiff's contentions, since defendant's principle objection to them is obviated by the results of plaintiffs' multiple regression analyses.

Plaintiffs caused two regression models to be made for each plant. The first covered all black and white employees hired after January 10, 1980. The second added all employees hired during 1979 who were still present as of January 1980. Each model controlled for high school education, college education, trade school instruction, welding training in trade school, supervisory experience, prior experience with Trinity Industries, military training, and twelve additional categories relating to prior experience. In addition, the models controlled for whether any particular job was applied for, and, if so, the job for which the individual applied. Holding all these variables constant, blacks at the East Plant received an average of 0.35 per hour less in starting pay than whites. The probability that this result would have occurred by chance was less than one in 1,000. If employees hired in 1979 and still present in 1980 at the East Plant were included, the difference in pay between blacks and whites rose to 0.41 per hour. The probability of this occurring at random was also less than one in 1,000.

The results at Longview West, as in the wage comparisons, also revealed discrimination. At Longview West, statistics showed a somewhat smaller difference in starting pay. The probability that this resulted from chance was marginally higher. The difference in starting pay of blacks and whites hired after January 10, 1980, was 0.32 per hour; when employees hired in 1979 but still employed at the

plant in January 1980 are included, the difference rises to 0.38 per hour. These results are significant at .01 and .001, respectively.

Trinity Industries' chief defense to these statistics was to offer alternate models using different methods and different terms, which appeared to obviate the statistically significant effect of race on initial pay. For example, the defendant's expert divided his examination into two phases: (1) initial placement, and (2) pay within job categories. He mensurated whether defendant discriminated against plaintiffs by ascertaining whether blacks and whites received the job for which they applied. He then compared black and white average salaries within jobs.

Plaintiffs objected to defendant's methodology for a variety of reasons. Initially, they argued that analyzing placement and pay separately attenuated the significance of results adverse to blacks. Tr. 1693. More importantly, they pointed out that blacks tended not to apply for specific positions, which plaintiffs attributed to their more limited access to information about available jobs. More than twice as many blacks at the West Plant were left out of defendant's calculations as whites (35% of blacks did not specify jobs applied for, versus 14.5% of whites). When the number of black employees at the West Plant was small to begin with, the exclusion of a substantial proportion of blacks from defendant's calculations is a cause for concern.[41]

In this connection, defendant argues that a comparison of blacks and whites within a certain job category—such as welder's helper—

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[41] Although only 235 out of 561 individuals who were hired at the East Plant specified pay applied for, Plaintiffs Exhibits 100a, 101a, there is apparently no easy way of determining how many of these were black. Plaintiffs submitted an exhibit which purported to show that the persons who did not specify pay applied for were significantly different as a group from those who did (Plaintiffs' Exhibit 104), but the exhibit is an incomprehensible computer printout. There is no way to ascertain whether blacks constitute a disproportionate number of those who did not specify pay applied for from Exhibit 104; and defendant's attack on plaintiffs' claim that the two groups differed in statistically significant respects, Tr. 1852-53, went unrefuted by plaintiffs. Nevertheless, plaintiffs presented impressive statistical evidence that, whether they specified pay applied for or not, blacks were hired at significantly lower wages than whites. See pp. 42-43, infra.

shows little disparity in pay. By contrast, plaintiffs compare persons of equal qualifications and claim that equally qualified blacks were paid less than whites by the mechanism of placing them in lower paying job classifications. Thus, defendant's argument is, essentially, that if a black welder and a white welder are equally qualified, and the black welder is assigned to a Welder "C" category while the white welder is assigned to a Welder "B" category, no discrimination exists, because the black is paid the same as white "C" welders. Tr. 1696.[42] In the system proffered by defendant, black leaders are paid the same as white leaders, and white janitors the same as black janitors. However, it is to be observed that there were no black leaders, and in three of the past five years, there were no white janitors.

Defendant also duplicated plaintiffs' regressions, adding the term "pay applied for", which resulted in the dilution of the race effect to insignificance. There are several major flaws in this methodology. In the first place, a large number of individuals—and a proportionately much larger number of blacks—did not apply for any specific pay level on their applications. A cursory glance at the nineteen employment applications of black employees, offered serially in evidence by defendant (see, Exhibits 34a through 52a, and 54a), shows that only four contain any explicit salary figure. One of these asked for a wage that was below the minimum wage at the time.[43] Plaintiffs, running a more systematic check, showed that over half the individuals hired at each plant did not put down any specific pay in the "pay applied for" section of the application. Tr. 1706. The plaintiffs then offered a series of statistical analyses which showed that, of applicants who did specify pay applied for, blacks applied for lower pay. This finding

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[42] This logic is comparable to Anatole France's mocking observation:

> "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges...." Anatole France, Le Lys Rouge, Ch. 7 (1984).

[43] Daymond Jeter asked for $3.00 per hour on March 27, 1980, when the law required that he be paid $3.10 per hour. 29 U.S.C. §206(a)(1). Defendant's exhibit 46(a).

[44] This analysis applied only to the East Plant; because of the very scant number of blacks who specified pay applied for at the West Plant, plaintiffs' expert conceded that little reliance could be placed on a similar finding at the West Plant. Exhibit 103.

was statistically significant at one in 1,000 (i.e., a chance of one in 1,000 that the differences in pay applied for were not due to race). Plaintiffs' Exhibit 101.[44] Further, the plaintiffs showed that blacks who specified pay applied for also received lower pay than similarly qualified whites. Plaintiffs' Exhibit 101. Plaintiffs also examined the group of applicants who did not specify pay applied for and found, again holding qualifications constant, that blacks received lower pay than whites. Plaintiffs' Exhibits 100, 102. Defendant vigorously denied that an individual's specification of a lower rate than his qualifications would have merited had any influence on the wage received. Defendant claimed that the wage applied for was used as an index of an applicant's skill at, for example, welding:

> Well, pay applied is really just another factor in giving you some information on a guy's experience. To give you an example, if you needed a welder, a higher class welder, a B or A welder, somebody that the general pay scale was somewhere around like seven and a half or eight dollar range, somewhere like that. If you were looking for a welder of that type...and you got an applicant...and his application said he could do that, but he put "salary desired" four and a half, five, six dollars an hour...you would question right away whether he's capable of doing that type work, and the reason for that, if he's a A class welder, he'd know what the area pays.

Tr. 1179 (Steven Randall).

However, there were a substantial number of applications which specified no wage, thus reducing the efficacy of pay applied for as a tool in gauging an applicant's experience. In addition, there are other,

considerably more appropriate measures of skill at a craft, such as experience, certification, or the results of more vigorous and uniform welding tests. Most importantly, even assuming that "pay applied for" was used in good faith by Trinity, it is clear that blacks who applied for lower wages may have had many reasons to do so related to existing discrimination.[45] To use "pay applied for" to determine an applicant's skill could only unwittingly perpetuate existing discrimination. In other words, if defendant intentionally used "pay applied for" to channel blacks into lower-paying positions, their discriminatory treatment violated the law. If defendant employed pay applied for in good faith as a measure of skill, it clearly transgressed legal standards by using a procedure with the discriminatory impact and little or no business justification.

Defendant's alternate model, i.e., using pay applied for, is therefore rejected, because that additional explanatory term does not explain the outcome in the many cases in which no pay applied for was specified, and, in the instances where it was specified, likely was a result of factors other than skill and experience.

APPLICABLE LAW

Plaintiffs' and defendant's threshold argument concerns whether the class claims of discrimination in initial placement must be analyzed under the discriminatory impact or discriminatory treatment model. Plaintiffs claim that either model is appropriate, citing to Page v. U.S. Industries, 726 F.2d 1038 (5th Cir. 1984). The Court of Appeals for the Eleventh Circuit has also held very recently that either model is appropriate in a case where subjective selection procedures are under attack. Griffin v. Carlin, 755 F.2d 1516, 1523 (11th Cir. 1985).

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[45] A continuing theme throughout the trial was the willingness of blacks to accept whatever job or wage was offered because of their need for employment:

> "He asked me if I could work for five thirty-five. I said, 'yes, I need a job.'
> "

Tr. 1105 (Boston).

> "I told him I wanted to be a forklift operator. He said he needed some grinders. Not knowing what it was, I needed a job, so I told him I would try that."

Tr. 1069 (Jones).
See also Tr. 1500 (Davis).

However, the overwhelming authority of Fifth Circuit law maintains that the very claim of subjectivity and discretion that plaintiffs are attempting to advance flatly contradicts the notion that defendant's practices were neutral in their application. In Walls v. Mississippi State Department of Public Welfare, 730 F.2d 306 (5th Cir. 1984), the Fifth Circuit held: "The use of subjective criteria to evaluate employees in hiring is analyzed not under the disparate impact model but instead under the disparate treatment model." Id. at 321. See also Lewis v. N.L.R.B., 750 F.2d 1266, 1271 (5th Cir. 1985); Hill v. K-Mart, 699 F.2d 776, 779 n.6 (5th Cir. 1983); Williams v. New Orleans Steamship Ass'n., 673 F.2d 742, 750, n.14 (5th Cir. 1982); Pouncy v. Prudential Insurance Co., 668 F.2d 795, 799-802 (5th Cir. 1982). Therefore, the class claim of discrimination in initial placement will be considered under the disparate treatment model.

When the case has been fully tried, the proper inquiry of the trial court should be whether the employer intentionally discriminated against the plaintiff. U. S. Postal Service Board of Govenors v. Aikens, 460 U.S. 711, 714-15 (1983), Lehman v. Trout, ___ U.S. ___, 104 S. Ct. 1404 (1984). At this stage, the McDonnell Douglas/ Burdine three-step analysis is "no longer relevant," Jones v. Western Geophysical, 761 F.2d 1158, 1161 (5th Cir. 1985). The disparate treatment model requires proof of discriminatory intent. Because it is so intrinsically difficult to obtain direct evidence of discriminatory motive, courts have pointed the way to proof by other methods, including "gross statistical disparities alone." Lewis v. N.L.R.B., 750 F.2d 1266, 1271 (5th Cir. 1985). A court may also examine the history of the employer's practices, anecdotal evidence of class members, and the degree of opportunity to treat employees unfairly in the appraisal process. Id. at 1272. In order for a class claim to prevail, a plaintiff must prove that discrimination was "the company's standard operating procedure—the regular, rather than the unusual practice." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977); Lewis v. N.L.R.B., 750 F.2d 1266, 1271 (5th Cir. 1985); Walls v. Mississippi Department of Public Welfare, 730 F.2d at 321.

"Gross" statistical disparities have been found to exist when disparities are "greater than two or three standard deviations." Castaneda v. Partida, 430 U.S. 482, 496 n. 17 (1977). Although

defendant in its post-trial brief disputed the soundness of plaintiffs' models by insisting that they should have included pay applied for, Vol. II B, p. 40-41, defendant at no time argued that plaintiffs' statistical models should be disregarded because the disparities in plaintiffs' statistical models were not significant.

The failure to include terms for "job assigned" and "pay applied for" in regression analyses run by plaintiffs on initial placement at both plants was entirely appropriate. Moreover, the plaintiffs' statistical models were sound, and the results for the East Plant revealed gross disparities between the starting pay of equally qualified blacks and whites. The probability that this could have been a result of chance was negligible. This conclusion is bolstered by the comparison analysis performed by the plaintiffs. Even regarding the statistical evidence as insufficient to establish discriminatory motivation by itself, notwithstanding, the anecdotal testimony and individual cases (such as that presented by Ray Charles Boston), constitute weighty evidence that, in this instance, the statistics are not misleading.

The defendant's procedures for hiring and placement were "employment practices...based upon the subjective judgment of white supervisory personnel [which are] a ready vehicle for discrimination." Page v. U.S. Industries, 726 F.2d 1038, 1054 (5th Cir. 1984), quoting Rowe v. General Motors, 457 F.2d at 359. The use of predominantly subjective criteria by an employer warrants "strict scrutiny" for evidence of racial discrimination by the court. Carroll v. Sears Roebuck and Co., 708 F.2d 183, 192 (5th Cir. 1983). Evidence which showed how readily subjective factors were used in placement decisions was present, specifically the testimony of Louis Patterson and the notes on application forms regarding "good attitude." As one court noted with regard to terms such as "good attitude":

> The meaning of these terms is not apparent; their meaning peculiarly depends upon the undisclosed personal frame of reference of the particular witness....It is well recognized that subjective criteria can be a mechanism for either intentional or unintentional discrimination.

Nation v. Winn-Dixie Stores, Inc., 570 F.Supp. 1473, 1476 (N.D. Ga. 1983).

The complete absence of blacks from the highest-paying positions at the East Plant throughout its history, and the fact that there was no black foreman at that plant until the middle of 1983 are also significant factors to be taken into consideration. "To the noble theoretician predicting the collisions of weightless elephants on frictionless rollerskates, zero may be just another integer, but to us it carries special significance in determining firm policies and attitudes." Capaci v. Katz and Besthoff, Inc., 711 F.2d 647, 662 (5th Cir. 1983). These considerations lead to the conclusion that defendant had an intentional standard operating procedure which resulted in the placement of blacks in lower-paying positions at the East Plant, solely because they were black rather than on the basis of their merits.

WEST PLANT

The plaintiffs' case is not so overwhelming against the West Plant. As noted above, the statistics are not as uniform, the probability of their being the result of random chance is higher, and the disparities shown are smaller. While the difference in statistical findings may be a function of the smaller sample size, the difference in the West Plant is underscored by a noticeable difference in the attendant details. For example, while the applications from both plants in general have no interviewer's notes whatever on them, those few notations that were made at the East Plant almost always concerned appearance, and attitude (Defendant's Exhibits 35a, 36a, and 45a), whereas of the few applications submitted in evidence for the West Plant, such notations as appeared related to the employee's reported skills. (See, e.g., Defendant's Exhibits 52c and 34c.) The black witnesses who testified about conditions at the West Plant were all welders, rather than welder's helpers. One witness, Albert Sublett, testified that when he failed his first welding test, he was immediately allowed to retake the test and was subsequently hired. Several of plaintiffs' witnesses who had worked at both plants commented that conditions at the West Plant were not as bad as those at the East Plant. The four witnesses testifying for the plaintiffs who had been employees at the West Plant, Tommie Williams, Greg Jones, Andrew Scott, and Albert Sublett, expressed no dissatisfaction with their initial rate of pay, although Jones was disgruntled because he felt that he should have received

more promotions. While many employees at the East Plant testified to the existence of racial slurs at the East Plant, Tr. 496 (Homer Pilot), Tr. 621 (Frank Harvey), Tr. 711 (Leander Blair), Tr. 1031 (Andrew Scott), an employee who had been at both plants testified that he heard no racial epithets at the West Plant. Tr. 973 (Greg Jones). Andrew Scott, asked about racism at both plants, replied that, "[t]here were [sic] at the East Plant, and a little bit at the West Plant." Tr. 1031.

The statistics bear out Scott's conclusion, that racism existed at the West Plant. In fact, the statistics show rampant racism at the West Plant, which only appears to be "a little bit" when compared to the East Plant, where conditions were even worse. For example, while the disparities between black initial pay and white initial pay were somewhat smaller at the West Plant than at the East Plant, nevertheless, they constituted a difference in initial pay of $0.33 to $0.38 cents per hour. The level of statistical significance in plaintiffs' regressions showed that the disparity was almost certainly due to race. The probability that the difference in initial pay was due to chance was .001, when plaintiffs included individuals hired in 1979 still present at the plant in 1980, and .011, when only those hired after January 10, 1980, were included. These statistics are strongly buttressed by the absence of any semblance of objective job descriptions, as well as by the unfettered discretion given to Daniels to screen applicants and the West Plant foreman to set pay rates. However, the paucity of anecdotal evidence of actual discrimination in initial pay at the West Plant requires discussion of how much weight may properly be given to plaintiffs' statistics as proof of discrimination in initial placement and pay at the West Plant.

The Fifth Circuit has recognized that plaintiff may make a prima facie case that defendant engaged in a pattern and practice of discrimination "solely with statistics if they show a sufficiently great disparity between the employer's treatment of blacks and whites—a disparate result." Payne v. Travenol Laboratories, 673 F.2d 798, 817 (5th Cir. 1982). Although it is not clear what constitutes "a sufficiently great disparity," it can be inferred from the balance of the opinion that more than two, id. at n. 34, or three standard deviations, id. at n. 32, would meet the test.

The facts of this case raise a question that has rarely been addressed. Since plaintiffs' statistics show $0.33 per hour to $0.38 per hour disparity in initial pay—attributable to race at .01 and .001 levels of certainty—ought the court to focus on the disparity in wages or, rather, on the level of certainty, in determining whether plaintiffs' statistics show a disparity sufficiently "gross" to warrant an inference of discrimination?

The decision need not be reached in this instance, since plaintiffs' statistics regarding the West Plant establish a pattern and practice of discrimination with respect to either criterion. The Fifth Circuit has found disparities of $0.37 per hour to be gross, James v. Stockham Valves and Fittings, 559 F.2d 310, 329 (5th Cir. 1977). Plaintiffs' level of
certainty compares favorably with the Castaneda standard.[46] Finally, the spare, subjective job descriptions and unreviewed discretion given to the all-white group of foremen to set pay for the men working under them adds great weight to plaintiffs' statistics. "Although proof of discriminatory motive is generally required in disparate treatment cases, the evidence of subjective, standardless decision-making by company officials, which is a convenient mechanism for discrimination, satisfies this requirement." Boykin v. Georgia Pacific, 706 F.2d 1384, 1390 (5th Cir. 1983).

Accordingly it is found that defendant intentionally engaged in a pattern or practice of discrimination in initial placement and pay at the West Plant.

PROMOTION

The plaintiffs also charge that defendant discriminated with regard to promotion. In fact, this claim blends to some extent with the allegation that defendant discriminated in initial job placement. Shipes and other witnesses testified that, after they discovered the

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[46] Two standard deviations equal a certainty level of approximately .05; three standard deviations equal a certainty level of approximately .01. See footnote 37, supra.

disparities in pay between their own wages and those of their white co-workers, they began to complain and to ask for raises. Shipes, Tr. 48-49; Hobart Nelson, Tr. 526, 529; Tommie Williams, Tr. 752. Thus, the discrimination in job placement planted a seed of discontentment that gave rise to the request for promotions to equalize job pay and placement.

Tommie Williams' situation is illustrative:

A: Well, after I had been there for about three weeks, there was another guy up on top of the train welding with me, and he just asked me how much did I make, and he just asked me how much did I make, you know....

* * *

And I told him, and he asked me—I told him $5.35 an hour, and he said, "Is that all?"

I said, "Yes," and I asked him how much did he make, and he told me $6.41, I think, and then he told me, "Man, I couldn't work for that. You ought to tell them about it, because you're a good welder," and then about the next day or so I talked to Randy Harmon about it, and he was surprised how much I was making.

He said, "Well, I'll talk to them about it and see if I can get you a raise."

A: [sic]: Were you and Mr. Mobley, were you doing the same job?

A: Yes.

Q: Did you get a raise?

A: Yes, I got a raise about another month later.

Q: And how much were you making with your raise?

A: It came up to $5.65.

Q: So, even though you got a raise, you still weren't making as much as Mr. Mobley, were you?

A: No.

Tr. 753. (See also Tr. 1073 (Willie Jones)).

The system for promotion[47] at both plants resembles the system for initial placement. However, in the case of promotions, it was the foreman who exercised the unreviewable, subjective discretion exercised by Louis Patterson and Jerry Daniels in the matter of initial placement. The only written guidelines for promotion at the East Plant were the job descriptions, which have been discussed previously, and, occasionally, written evaluations. (see, p. 55 infra). The West Plant had no promotion guidelines of any nature. Plaintiffs' Exhibit 96, p. 30. Neither plant posted job openings; that is, when jobs became vacant, they were filled without any notices being posted regarding the vacancies. Many of the plaintiffs' witnesses complained bitterly that they were not given a chance to compete for available jobs, particularly the supervisory positions:

Q: Would you have liked to have been considered for those positions of foreman and lead man?
A: I would like to have been given the opportunity to find out.

Tr. 551 (Hobart Nelson).

Again, the East Plant seemingly had the more formal system. Under

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[47] A "pay raise" and a "promotion" were considered equivalent by defendant. Pre-trial order, August 26, 1984, Stipulation 17, p. 39.

the procedures reputedly employed there, an employee was to be evaluated by his foreman after thirty days for a raise, and thereafter at six month intervals. If the foreman did not believe that an employee merited a promotion, the matter ended there. If the foreman recommended a promotion, the recommendation was reviewed by Steve Randall, the assistant plant supervisor, who checked to make certain the employee had been employed for the requisite thirty days, and that it had been at least six months since the last raise. Randall also reviewed the employee's attendance, and discussed the individual with the foreman. If Randall did not approve the raise, the issue was closed. If he approved the raise, the request went to Bobby Husted, plant manager, for final approval. Supposedly, the foremen were to discuss an employee's evaluation with Husted. Moreover, there was an effort made by defendant to establish that a system of written evaluations had been adopted; but even the defendant's own witness belittled the results:

> When they started it up [the written evaluation system], they didn't keep it up very long. That's before the laying off and stuff started...It didn't last very long.

Tr. 1552 (Jessie Bradley).

Apparently, the only review of promotion recommendations occurred when they were positive, for there was no review of denial of promotions. Under this system, the foremen had complete discretion over access to promotion and raises. With only one recent exception[48], all the foremen at Longview East have been white. There were virtually no written guidelines as to what skills entitled an employee to a promotion. In fact, a supervisor had discretion even as to the amount of the wage increase an employee received. For example, although promotions were generally one step at a time, supervisor Jeff Rowe promoted Danny Stone, a white man, directly from Helper B to Welder C-1. (Plaintiffs' Exhibit 5.) Rowe also gave David Stout, another white man, a promotion without changing his job classification. (Plaintiffs' Exhibit 6.) Thus, the amount of these pay raises were

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[48] See footnote 18.

obviously within the supervisor's discretion. See Tr. 1269.

The system at Longview East did not operate as it theoretically should have. Some promotions for blacks transpired after their first thirty days; certain promotions for whites were received in less than the prescribed six months. Such promotions as blacks did obtain failed to equalize their pay with their white counterparts. Tr. 526 (Hobart Nelson); Tr. 753 (Tommie Williams); Tr. 1111 (Ray Charles Boston).

The limited guidance provided by the job descriptions appears to have been ignored. For example, the job description for a Class A welder meshes with the information on Homer Pilot's application. (Defendant's Exhibit 36a.)[49] Although Pilot had almost three years of experience as a welder, and welding was the only experience listed on his application, he was given the job of Carman, Class B, Step 2, for which there is no job description. (Defendant's Exhibit 36a.) His first merit promotion, two and one-half months later, shows that he was being promoted to Carman, Class B, Step 2. In other words, Pilot was "promoted" to the same position into which he was hired. (Defendant's Exhibit 36b.) The evidence confirmed that the unchecked discretion given to foremen was abused by certain of them, whose names often recurred throughout the trial. Jeff Rowe, Shipes' white supervisor, was also Ray Charles Boston's supervisor. Ted Harris, a white foreman, was described by Andrew Scott, as "real prejudiced." Tr. 1031-32. Harris discharged Greg Jones a week after he became Jones' foreman, with no counseling or warning. Jones had theretofore worked for five months at the plant without coming to grief. The evidence also disclosed that Ralph DuBois, another foreman, told racist jokes, and told John McLure, a white man, that he would never make Hobart Nelson a leadman, because "he didn't think that the other white guys in the yard would like taking orders from a nigger." Tr. 1670.

PROMOTIONS AT THE EAST PLANT—
STATISTICAL CASE

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[49] Pilot described his job experience as "welder, welding on trailer," "welder," and "welding" in his three jobs.

Plaintiffs performed a total of five multiple regression analyses of promotions at the East Plant. The first, summarized in Plaintiffs' Exhibit 49, showed a statistically significant disparity in merit increases in pay between blacks and whites, with a probability of one in 1,000 that the results were reached by chance. The plaintiffs' expert did a stepwise analysis on this first run, because his computer did not have the capacity to analyze all of the variables in a single run. Later, plaintiffs' expert executed three more multiple regression analyses, which confirmed the results reached in Exhibit 49. Plaintiffs' Exhibits 78, 79, and 80. All of these regression analyses compared increases in adjusted pay of blacks and whites, taking into account tenure at the plant, job title, department, beginning adjusted pay, number and reason for breaks in service, qualifications prior to hire, and, in some cases, absences. Plaintiffs also attempted to control for differences in wage raise actions by including variables for each half-year between January 1980, and December 1983, and one for the first three months of 1984. These variables indicated whether the employee was present during each six-month period, and were designed to account for the advantages and disadvantages of having been an employee at the plant at a particular time, such as during the major layoffs in June and July 1980, or during peak periods of employment. All four regressions showed a highly statistically significant disparity in wage raises adverse to blacks.[50]

Defendant offered numerous criticisms of plaintiffs' models, as well as offering an alternate model of its own, which defendant claimed more accurately captured the realities at Longview East. Defendant criticized the fact that plaintiffs included in their analyses employees who had worked at the plant very briefly, and had never been eligible for a raise under the plant's thirty-day review policy. Plaintiffs responded by displaying a regression analysis which excluded

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[50] The wage differential itself was a difference of fourteen cents an hour over an employee's entire tenure, if absence variables were included, Plaintiffs' Exhibit 49, and twelve cents per hour, if absence variables were omitted. The chance that those differentials were attributable to chance was one in 1,000.

all employees who had worked less than thirty days at the plant. The resulting figures were even more adverse to blacks, with a fifteen cents per hour difference in pay raises, and they showed, as well, even less probability of being the result of chance. Plaintiffs' Exhibit 105.

Defendant also criticized plaintiffs' inclusion of variables accounting for previous background and experience, and pointed to the dangers of multicollinearity[51] in some of the plaintiffs' terms. Finally, defendant argues that "the most significant flaw shared by all three [of plaintiffs' regressions] was their comparison of individuals employed during completely different time periods." Defendant's Post-Trial Brief, Vol. III, p. 43. Dr. Schucany, defendant's statistical expert, acknowledged the plaintiffs' efforts to account for different time periods by including variables for an employee's presence at the plant during six-month periods, but considered it an insufficient remedy. He testified that "the inclusion of these dummy variables does not adequately capture all of those differences [created by different economic conditions]." Tr. at 1830. Defendant offered as an alternative a regression model which compared employees who were employed at least a year. The only independent variable was one based on job categories. The defendant's analysis showed a differential adverse to blacks in three out of four years, but not at a level of statistical significance.

Defendant's most persuasive criticism of plaintiffs' regressions was its objection to the inclusion of employees who remained at the plant less than thirty days. Plaintiffs rebutted this objection by showing an even more statistically significant effect when employees whose tenure was under thirty days were removed from the sample.[52] Defendant's expert characterized the removal of these individuals from the sample as an "excellent decision" on the part of plaintiffs. Tr.

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[51] The problem of multicolinearity arises when variables are used in a model that are correlated to the degree that there is little or no basis to decide which one should be allocated the predictive power that they share. It can cause instabilities in the statistical model, to the extent that small changes in the data can effectuate large changes in the coefficients for the correlated variables. Tr. 1766, Baldus and Cole, §8A (1980).

[52] This analysis revealed a fifteen cent per hour difference in pay raises, with a significance of better than one in 1,000. Plaintiffs' Exhibit 105-B, Tr. 1723.

1831.

Plaintiffs responded to the criticism of inclusion of background qualifications by arguing, in substance, that they were included to counterbalance the effects of defendant's discriminatory placement of blacks in lower-level jobs. Plaintiffs thus attempted to compare promotion rates of individuals with similar qualifications rather than simply individuals within a job category, as defendants did. More importantly, plaintiffs pointed to the defendant's response to their interrogatories asking for factors used in making decisions about promotions. Defendant responded that prior experience, trade school, etc., were factors used in making promotions. Plaintiffs' Exhibit 9(b), Answer to Question #3. The final argument, relating to the perils of multicollinearity, is essentially a battle between experts. Plaintiffs' expert, Dr. Bickhard, conceded that multicollinearity can present problems, but contended that they usually affect the reliability or the significance of the terms that are arguably multicollinear. Defendant's expert argued that multicollinearity can destabilize the entire regression. The defendant appears to have the better of the argument in this case:

> When variables are multicollinear, the erroneous omission or inclusion of any one of them in the regression equation is more likely to make a substantial difference in the magnitudes of the coefficients of the others....Indeed, by inflating the potential consequences of either wrongly including or wrongly omitting a qualification variable, the presence of multicollinearity increases the importance of controlling for variables correctly chosen on substantive and legal grounds.

Baldus and Cole, Statistical Proof of Discrimination, 8A (1980)

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[53] For example, after defendant criticized plaintiffs' model for including employees whose tenure was less than thirty days, plaintiffs ran a regression excluding those employees. After plaintiffs criticized defendant for comparing only those employees who had worked for the defendant continuously for an entire calendar year, defendant refined its analyses to include employees who had been present for shorter periods. Tr. p. 1827.

(emphasis added). See also Sobel v. Yeshiva University, 566 F.Supp. 1166, 1181 (S.D.N.Y. 1983).

However, at this point the court is left with defendant's intimation that plaintiffs' regressions may be unstable. Both sides conducted a series of extra analyses to meet each other's criticisms,[53] but defendant did no more than speculate that plaintiffs' regressions might have been destabilized by terms that were probably collinear. The defendant presented no evidence to show that the regressions actually were unreliable, as was done in Sobel:

> The absence of proper measures of experience and the presence of multi-collinearity created a multiple linear regression that was misspecified and unreliable. [Citations omitted.] This was demonstrated by the susceptibility of the sex coefficients to large variations when only small changes in data were made, such as the addition or exclusion of a single person. In one instance, the removal of a single faculty member from the data base lowered the relevant sex coefficient from $2,378 to $1,957, and the corresponding level of statistical significance from $2.13 to $1.77.

Id.

The defendant's criticism therefore is suggestive of possible flaws in the plaintiffs' model, but provides nothing conclusive to show that the model is actually defective. The defendant may not "simply attack the plaintiff's analysis through hypothesis and conjecture." (Footnote with citations omitted.) Schlei and Grossman, Employment Discrimination Law, at 1346 (2d Ed. 1983). The defendant's expert commented that:

> strong multi-colinearities [sic] can cause serious numerical instabilities...if we have serious multi-collinearities and the race indicator is also correlated with some of those variables, then it is to some extent involved in the multi-colinearities and all of those concerns about widely varying coefficient estimates

could show up in the race variable.

Tr. 1834 (emphasis added). Since the court is obviously in no position to do the calculations necessary to prove or disprove defendant's contention that multicollinearity could yield untoward results, the defendant's argument must remain at the level of informed speculation.

On the other hand, defendant's model, which includes only employees present for an entire year from January to December, is entirely unconvincing. Not only were the vast majority of employees excluded from the defendant's analysis, Tr. 1718, but a highly disproportionate number of excluded employees were black. There was less than one chance in 1,000 that the disproportionate black representation in the group of employees with less than one year's tenure was a result of chance. Plaintiffs' Exhibit 106(a)-(c). Since plaintiffs were correct in their complaint that defendant discriminated against blacks in lay-offs and terminations, see infra at pp. 76 and 84, approving defendant's comparison of the few plant employees who were present from January to December of a given year would, in effect, reward defendant for its practices of laying off and terminating blacks at a higher rate than whites. Although, in rebuttal, defendant's expert claimed to have done "snapshots" at six and three-month intervals, with no change in results, Tr. 1827-28, he did not produce these analyses at trial, and they are not in evidence.

APPLICABLE LAW

The defendant's practices with regard to promotion appear entirely subjective and devoid of protection from discrimination. Both the theory underlying these practices, as testified to by defendants, and the reality, as manifested through defendant's own exhibits, plaintiffs' and defendant's witnesses' testimony, and plaintiffs' statistics, support this conclusion. The Fifth Circuit has "found appraisal systems which allow for subjective evaluations by white supervisors to be evidence of discrimination in disparate treatment cases." Lewis v. N.L.R.B., 750 F.2d 1266, 1276 (5th Cir. 1985). As that court has recently noted, the evils of a subjective system are that it creates "a procedure that can easily be used to mask racially motivated hiring decisions." Payne v. Travenol Laboratories, 673 F.2d 798 at 824 (quoting Phillips v. Joint

Legislative Committee, 637 F.2d 1014, 1026 (5th Cir. 1981)), and thus " 'may present a situation conducive to invidious discrimination.' " Page v. U.S. Industries, Inc., 726 F.2d 1038, 1055 (quoting Hill v. K-Mart Corp., 699 F.2d 776, 781 (5th Cir. 1983)). The Fifth Circuit has repeatedly "expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect non-discriminatory action." Crawford v. Western Electric Co., Inc., 614 F.2d 1300, 1316 (5th Cir. 1980); James v. Stockham Valves and Fittings Co., 559 F.2d 310, 330 (both quoting Rowe v. General Motors Corporation, 457 F.2d at 359 (5th Cir. 1972)); Johnson v. Chapel Hill Independent School District, et al., Civil Action No. TY-82-213, Order of July 29, 1985, pp. 23-24. Furthermore, the defendant's system had few of the safeguards which distinguished the N.L.R.B. system in Lewis v. N.L.R.B., 750 F.2d 1266 (5th Cir. 1985). No grievance system was in place at either plant; and the supervisors making the evaluations had not been trained to do so properly. Id. at 1276. Both written and oral evaluations of an employee's work were made sporadically. In a recent Eleventh Circuit opinion, the court condemned informal review procedures and failure to post job openings, and pinpointed why such procedures could readily lead to discrimination:

> The defendant used no formal procedures for posting notices of available promotions or for determining who would be offered the promotion. Instead, the company relied on "word of mouth" and informal review procedures. We have recognized that such subjective procedures can lead to racial discrimination, both because important information may be available only to whites and because such procedures place no checks on individual biases. (Citations to Fifth Circuit precedent omitted.)

Carmichael v. Birmingham Steel Works, 738 F.2d 1126, 1133 (11th Cir. 1984).

Taking into account the extensive testimony at trial that blacks were not notified of openings; that the foremen who made the pay raise and promotion decisions were white and made racist remarks; that the exhibits offered into evidence by both plaintiffs and defendant

showed promotion practices inconsistent with defendant's rules; and that the statistical evidence of plaintiffs was essentially unrebutted, it is found that defendant discriminated against plaintiffs at the East Plant with regard to its promotions and wage increases.

Plaintiffs did not present any statistical evidence with reference to promotions at the West Plant. Furthermore, the anecdotal evidence presented was fairly weak. Albert Sublett's complaint, that a white man, Roger Crittenden, was making more money and running an easier welding machine, was more an issue of placement than promotion. Sublett acknowledged that he got "quite a few" promotions, and that his supervisor, David McCarty, did not discriminate against him. Tr. 1062. Therefore, it is found that plaintiffs did not carry their burden of proof with regard to intentional discrimination in promotions at the West Plant.

LAY-OFFS

Plaintiffs also claim that defendant laid off black employees in a racially discriminatory manner at both plants. At the East Plant, defendant was forced to make a very substantial reduction in its work-force around June 1980. In the two weeks between the end of June and the beginning of July, defendant laid off 150 employees at the East Plant. Defendant testified that its process for lay-offs was essentially the same process employed for promotions, except that when it was making lay-off decisions, employee flexibility became an added consideration. Otherwise, the same factors that defendant's supervisors testified that they looked to in making promotion decisions—productivity, attendance, and attitude—were used in deciding who to lay off. Lay-off decisions were made by the plant manager, in consultation with the plant supervisor, assistant supervisor, and the

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[14] See, e.g., the Testimony of Andrew Scott:

> Q: ...how many people were laid off at the time you were laid off?
>
> A: Well, I really don't know how many people because they didn't tell me that I was laid off. When they gave me my check...they had a letter in the check saying that I was laid off.
>
> Q: Okay.
>
> A: So I don't know how many people got their letters that evening.

foreman. At both the East and West Plants, these individuals were all white men. They followed no written guidelines.

The claim of discrimination in lay-offs is necessarily more susceptible of proof by statistical evidence than by anecdotal testimony. While blacks employed at the plant could and did compare their wages and wage increases with their white co-workers, a laid off black was in less of a position to know who else had been laid off.[54] The evidence adduced on this point was conflicting and inconclusive. As one credible witness for the defendant, Jessie Bradley, testified:

> Q: No, beginning in 1980 Trinity had to lay off a lot of employees at the East Plant. Did you see any evidence of discrimination in those lay-offs?
>
> A: Can I say one thing?
>
> Q: Sure.
>
> A: I'm answering this question only as to what happened in my department.
>
> Q: Okay.
>
> A: No.

Tr., p. 1544.

One of plaintiffs' witness, Willie Jones, was not laid off immediately. He reported his perceptions of the first few days of lay-offs, commenting: "I didn't know of any whites being laid off. I would look around each day after they started laying off. I would see more of the black people that I had been seeing there weren't there any more." Tr. 1074.

Plaintiffs analyzed defendant's layoffs at the East plant by using

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[55] Plaintiffs' Exhibit 39(a) compares black and white employee histories overall; Plaintiffs' Exhibit 39(b) breaks down layoff analysis by job title; and Plaintiffs' Exhibit 39(e) is a summary of both lay-offs and discharges at the East Plant by job title.

two different methods. They conducted a total of eleven analyses of layoffs at the East Plant. First, plaintiffs used a hypergeometric test, to compare the proportion of blacks laid off to the proportions of blacks expected to be laid off given their presence in the defendant's workforce. Plaintiffs measured black presence in the workforce in three different ways: a simple comparison of the number of blacks employed at the plant with the number of blacks and whites employed at the plant ("employee histories");[55] a comparison of the number of days that blacks were employed compared with the number of days that blacks and whites were employed ("employee days");[56] and, finally, the number of periods of employment for black employees[57] compared with the number of periods of employment for black and white employees.[58] Defendant also measured lay-offs using a hypergeometric test, but compared employee-quarters, i.e., a quarter during which an individual was either employed continuously or laid off, and compared the number of employee quarters for black employees with the number of quarters for black and white employees.[59] Defendant vigorously objected to plaintiffs' three methods of calculating black presence in the workforce, which plaintiffs also used in analyzing defendant's discharge activity. The basis for defendant's attack was that "by just pooling all of these measures of presence at the company together over the entire period, there is not a proper assessment of the composition [of the employer's workforce] at the relevant times." Tr. 1351. In other words, while defendant looked at the proportion of blacks and whites present at the beginning of each quarter, and compared proportions of blacks to whites laid off

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[56] Plaintiffs' Exhibits 43(a), (b), and (c).

[57] The plaintiffs' use of periods of employment is explained in Plaintiffs' Exhibit 38. Essentially, it takes into account the possibility that an employee may have worked for the defendant, resigned or been laid off, and came back to work for defendant again, making two periods of employment. Since the race significance level was higher for the model using periods of employment than for the model using employee histories, plaintiffs' expert concluded that blacks were more subject to multiple lay-offs than whites. Tr. of Expert's Testimony, 88.

[58] Plaintiffs' Exhibits 36(a), (b), and (c).

[59] Defendant's Exhibit 22(b).

over only that quarter, and then repeated this analyses for the sixteen quarters at issue, plaintiffs examined employee days over the entire period in question, at periods of employment for the entire period, and employee histories over the entire period.

Defendant's objections to plaintiffs' methodology are discounted, for three reasons. First, defendant's own method, which is considered to be sound, produced essentially the same results as plaintiffs' methods: defendant's statistics showed a disproportionate number of blacks laid off. Defendant's Exhibit 22(b), Expert's Tr. 91.

Secondly, plaintiffs performed a hypergeometric test of lay-offs during the time in which the East Plant laid off the greatest number of employees, June 20 to July 2, 1980. Plaintiffs' Exhibit 107. This analysis did not have the flaws of which defendant had complained in plaintiffs' earlier analyses; in fact, defendant's expert conceded it was "highly credible." Tr. 1830. This analysis also found that blacks were laid off highly disproportionately to their presence in the workforce. Defendant's reaction to this analysis was that plaintiffs must have isolated the only time during which blacks were laid off disproportionately to whites: "The significance of Plaintiffs' Exhibit 107 is that if any disparity ever existed in layoffs at the East Plant, it could only have occurred during that one twelve-day time period." Defendant's post trial brief, Volume III, p. 54. That defendant treated black employees adversely for twelve days, but never prior to that time, and never again after that time is simply not credible.

Thirdly, plaintiffs did not confine their analysis to the hypergeometric models, but proceeded to execute three multiple regressions and a logistic analysis.[60] These additional analyses confirmed plaintiffs' and defendant's finding that blacks were laid off

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[60] A logistic analysis reduces the potential flaw in a multiple regression analysis of lay-offs of a non-normal distribution of error. This problem arises because in the multiple regression, a one-zero coding is used to measure layoff activity, and there is a chance that, because of this coding, the normal distribution of errors will not occur. Plaintiffs' expert explains logistic analysis in more detail at Expert's Tr. 112-116. In fact, the logistic analysis matched the multiple regressions, showing that the non-renewal distribution of error had little effect on the regression results. Expert's Tr. 115.

disproportionately to whites at the East Plant. Plaintiffs' Exhibits 45, 58, 66, and 47. At least one of these models, Exhibit 66, did include time indicators for six-month intervals of time. The congruence of defendant's findings, and the results of plaintiffs' testing of the June 20 through July 2, 1980, period (using the method defendant approved of and nevertheless showing disproportionate layoffs adverse to blacks) provides ample evidence that plaintiffs' methodology did not distort the findings by showing racial discrimination where none existed.

Although Louis Patterson, personnel manager at the East Plant, explained that he monitored the percentage of black employees being laid off, and that the proportion of blacks after the large lay-off was virtually the same as the proportion before the lay-offs began, this fact did not seem consonant with the findings of both plaintiffs' and defendant's experts of a statistically significant disproportion of blacks laid off in comparison to whites. See Defendant's Post-Trial Brief, Vol. III, pp. 55-56.

As defendant rather disingenuously characterized the situation:

> Thus, Dr. Schucany was presented with an apparent anomaly. While his lay-off analysis indicated more blacks were laid off than expected, the percentage of blacks in the workforce remained relatively constant. This suggested to Dr. Schucany that something else had to be going on rather than intentional discrimination against blacks.

Defendant's Post-Trial Brief, Vol. III, p. 57.

Defendant explained the finding of disproportionate black representation among individuals laid off by the East Plant by its own witnesses: that it was in some way connected to a correspondingly disproportionate number of white resignations at the East Plant. Apparently, defendant's theory was to the effect that a large number of white resignations, prompted by rumors of impending layoffs, might alter the pool from which defendant chose its layoffs, so that the

black layoffs were not actually disproportionate when compared to the continually changing pool of employees. Tr. 1475-78. Plaintiffs responded by analyzing the period during which the greatest concentration of lay-offs took place at the East Plant, from June 20, 1980 to July 2, 1980. Plaintiffs' Exhibit 107. It was during this time that Shipes and 119 others were laid off. Plaintiffs tested the hypothesis that either prior resignations or contemporaneous resignations affected the racial proportions of the labor force which defendant laid off, so as to explain the disproportionate number of blacks laid off.

> Q: So, what do you conclude about the explanation posited by defendant that resignation rates should somehow explain the observed disproportion and [in] black layoffs?
>
> A: Well, there's basically no support for it...looking at it both with respect to prior resignations and with respect to contemporary resignations,...we still end up with an adverse disproportion against blacks significant at better than one in 1,000.

Tr. 1742.

Defendant's expert conceded that these analyses were "very credible." Tr. 1830.

Defendant's final argument was, in substance, that if resignations and lay-offs were combined into the category of "leaving the plant", then the number of blacks who left the plant was not disproportionate.

As the defendant put it:

> In summary this exhibit showed that one would have "expected" 111.5 blacks to have either resigned or been laid off, adjusting the total based on jobs. In fact, 116 blacks actually left for these reasons, a total which was not statistically significant.

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[61] "Alas for you, lawyers...you strain at a gnat, and yet swallow a camel!" Matthew 23:24.

Defendant's Post-Trial Brief, Vol. III, p. 63.

It appears that defendant would have the court consider that resignations and lay-offs are equivalent or fungible, and thus disregard the findings of defendant's own expert that blacks were disproportionately laid off merely because so few blacks resigned.[61] Without belaboring the obvious, a resignation is an individual decision, made by the employee. A lay-off is a decision outside the control of the employee, made by the employer. Absent special circumstances of harassment or coercion, an employer is rarely found guilty of discrimination when an employee resigns, and certainly not found guilty on a class-wide basis, see Markey v. Tenneco Oil Co., 439 F.Supp. 219, 243 (E.D. La. 1977). Lay-offs, completely within the control of the defendant, are a ready vehicle for racial discrimination.

Since defendant had control over lay-offs, but not resignations, the stable racial proportions at the plant may have been caused by the high number of white resignations. The stability of the racial proportions would then be despite the defendant's actions rather than as a result of them. Therefore, it is found that defendant discriminated against blacks at the East Longview Plant in its layoffs.

The evidence regarding the West Plant was more spare. Plaintiffs did hypergeometric studies similar to the studies that they had performed for the East Plant, measuring employee representation in terms of employee history, employee days, and periods of employment. Highly statistically significant results overall were found in each of these areas. At the West Plant, the probability that the numbers of black employees laid off occurred in a race-neutral environment was .001 with regard to employee history, .017 with regard to employee days, and .000 with regard to periods of employment. Defendant's statistics confirmed the disproportionate number of blacks laid off, although defendant found a level of significance of .048. Defendant's Exhibit 11(b). Defendant claimed that this was the result of a different job grouping, and that an earlier statistical run with the different groupings had not shown any statistically significant disproportion of black layoffs. However, the different job groupings was one that "the parties agreed to," Defendant's post-trial brief, Vol. III, p. 65, and it

is difficult to believe that the plaintiffs could have lured defendant into a statistical trap, since both defendant's counsel and its statistical expert were eminently qualified to protect themselves against such an occurrence.

It is more disturbing that the plaintiffs conducted multiple regressions such as they had for the East Plant, and did not obtain results showing discrimination. Expert's Tr. 170. However, merely because plaintiffs vastly exceeded their burden with respect to statistical demonstration of discrimination in layoffs at the East Plant is no reason to discount the findings of both plaintiffs and defendant in their hypergeometric analyses.

Defendant also argued that lay-offs at the West Plant had been so massive that "there is not really any issue of discrimination because for all practical purposes everyone at the West Plant was laid off." Defendant's post-trial brief, Vol. I, p. 35. On the same page, however, defendant mentions that when the West Plant reached its lowest employment level, it had eight employees, including five foremen. All foremen at the West Plant have always been white. Therefore, any tendency this reflects to retain foremen in the face of the most sweeping lay-offs clearly would have worked to the disadvantage of blacks. It is obvious that blacks can be discriminated against in lay-offs as long as defendant maintains a working operation, and continues, as the West Plant has, to lay employees off. See Plaintiffs' Exhibit 42; p. 1.

Very little anecdotal evidence was presented with regard to layoffs at the West Plant. Defendant presented witnesses who testified that many persons were laid off, and the lay-offs did not appear to be racially imbalanced. Tr. 1649-50 (Louis Bradley); Tr. 1654 (Robert Thompson). As has been noted previously, however, anecdotal evidence with regard to lay-offs is of less assistance, since blacks who have been laid off, especially during a large lay-off, are in no position to observe the effects of the lay-off; and blacks who have been retained may be unwilling to testify to perceived unfairness in lay-offs, for fear of losing their jobs. The statistical evidence will therefore, be given more weight. Accordingly, it is found that defendant discriminated against blacks at the West Plant in lay-offs.

DISCHARGES

Finally, plaintiffs claim that defendant discriminated against blacks in its discharges. The decision to dismiss an employee was entirely at the discretion of the employee's foreman at both plants. When Greg Jones' employment at the East Plant was terminated by Ted Harris, who had only been his foreman for four days, he attempted to protest his discharge to Louis Patterson. He testified that he "wanted to talk to Patterson...and Patterson said, 'What did he [i.e., Ted Harris] say?' He said, 'Whatever he said goes.' " Tr. 786. In other instances where an employee was dismissed, Patterson was either not involved at all, Tr. 1088 (Herman Parker),[62] or appeared merely to ratify a decision already made. Tr. 713 (Leander Blair). Patterson flatly denied ever having spoken to Jones about his termination, claiming that he was on vacation at the time. Tr. 1614. Patterson further testified that he "reviewed" all terminations. Tr. 222. However, since Patterson did not even speak to all the dismissed individuals, Tr. 223, it was fairly clear that he merely filled out the administrative paperwork ratifying the foreman's decision. There was no evidence that a foreman's decision to discharge an employee was ever reversed.

Defendant made no statistical analyses of job terminations for cause, insisting that because "the circumstances as to each termination are inherently unique," "therefore [it would be] more appropriate to evaluate these terminations for cause on an individual basis rather than by statistical analysis." Defendant's Post Trial Brief, Vol. IIA, p. 75. Defendant's argument on the issue of discriminatory terminations

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[62] While Parker was discharged at night, when Patterson would not have been present, it is obvious from that fact that the foreman had the authority to terminate an individual's employment summarily without review. Parker's sole recourse was to appeal the action to the EEOC. Tr. 1089.

[63] This figure includes instances in which insubordination and absenteeism were both given as reasons for discharge.

[64] This figure includes instances in which both absenteeism and unsatisfactory performance were given for discharge, but not instances characterized as "deliberate unsatisfactory performance," which were included in the second category of insubordination or refusal to follow instructions.

included a list of the reasons given on the Database for the termination of each employee. The argument culminated with a conclusion: since the grounds given for termination were legitimate, and "[n]o blacks were discharged for reasons that whites were not discharged for," no racial discrimination took place. Id., p. 84. The most frequent reasons given for discharge in the Database were: excessive absenteeism (93); some form of insubordination or refusal to follow instructions (30);[63] and unsatisfactory performance (19)[64]. It is obvious from the foregoing that the "legitimate" reasons given for discharge were almost all subjective; because there was no universally promulgated definition of "excessive absenteeism,"[65] and "insubordination" and "unsatisfactory performance" are obviously subjective judgments, made even more subjective by the defendant's failure to make foremen explain or define those terms. In fact, giving the broadest possible construction to the term "objective", there were only eighteen terminations listed out of 160 that could be considered "objective": terminations for reasons such as intoxication, theft from fellow employee, falsifying employment application, failure to report accident, and "placing explosive material under work to be torched causing injury to another employee."

The plaintiffs devoted much testimony to proving that the defendant's use of absenteeism transformed an ostensibly objective measurement into a subjective one. They questioned most of the defendant's management witnesses from the East Plant as to what constituted an excused absence, and the contradictions in the witnesses' testimony underscored the arbitrariness of the term "excessive absences." Tom Fleming, a foreman at Trinity East, testified, for example, that if an employee had a cold not considered by the employee to be severe enough to require going to a doctor, he "called in" sick, and the absence would be excused. Tr. 1539. Contrariwise, Steve Randall, the assistant plant superintendent, testified that a doctor's slip was necessary for an absence to be excused. Tr. 1260. Randall also testified that the policy with regard to excessive absences was "pretty much a rule of thumb." Tr. 1219. Bobby Husted, the plant manager, admitted that there was not a specific number of excused or unexcused absences that made an employee's absenteeism "excessive",

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[65] See pp. 69-70, infra.

for even the written rule that absence without notice for three days resulted in termination was flexible. "Then there may be a guy that's absent three or four days and he calls in and has a legitimate excuse. You just have to kind of go along with that." Tr. 832. Louis Patterson's testimony on the subject clearly demonstrates the extent to which each instance of absenteeism was handled on a case-by-case basis, rather than being subject to a general, universally applicable rule:

> Q: In what circumstances would a family illness be excused or unexcused?
>
> A: In the event, say if it's a child or something like that, and the spouse can take the dependent to the hospital. There's varying circumstances on that, and I don't recall what these circumstances were.
>
> Q: How would the decision be made? You would decide in each case whether or not an employee's spouse could have taken the child to the hospital?
>
> A: That would be reviewed, yes.
>
> Q: Well, if Mr. Blair was absent on those two days because his sister had been in an accident and had been killed, would that have been excused?
>
> A: It could have been, yes.
>
> Q: But it might not have been?
>
> A: You're saying if. If that were the circumstances, it could have been excused, but I don't recall the particular instance, no, I don't.

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[66] Other illuminating examples of Patterson's policy on absences can be found at Tr. 199-200.

Q: That would have been excused, if that would have in fact happened, would it not?

A: It could have been. I don't know. Like I said, I don't know what the circumstances were.

Tr. 1631.[66]

In addition to excessive absenteeism, employees were, as previously mentioned, frequently dismissed because of poor attitude, refusal to follow instructions, or insubordination. The large disproportion of blacks to whites discharged specifically for "insubordination" is conspicuous. (9-3).[67]

Unlike defendant, plaintiffs also performed statistical studies of dismissals at the East Plant. They compared the proportion of blacks discharged at the East Plant to the proportion of blacks in the East Plant workforce, using several different measures of exposure: counts of employees (Plaintiffs' Exhibits 30 and 40), counts of periods of employment (Plaintiffs' Exhibits 36 and 37), and counts of employee-days (Plaintiffs' Exhibits 43 and 44). Blacks were discharged disproportionately to whites under all three methods of measurement. The results were significant at a level of one in 1,000 under all three methods. Plaintiffs' statistical evidence is unrefuted by any statistical evidence of defendent.

APPLICABLE LAW

Defendant is incorrect, as a matter of law, when it contends that discharge is so necessarily individualized that it is not susceptible to class treatment or to statistical analysis. "[A] district court may not find a plaintiff's discipline statistics 'to be of "no value" because "each disciplinary action and/or discharge uses a separate factual situation." ' " Coates v. Johnson & Johnson, 756 F.2d 524, 539-40

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[67] This suggests that the supervisor's evaluation of whether an employee had a proper attitude—an extremely important factor at the East Plant, Tr. 828—may have varied according to an employee's race, because a supervisor's concept of what a proper attitude was could have varied according to the race of the employee.

(7th Cir. 1985); see also Pegues v. Mississippi State Employment Service, 699 F.2d 760, 765 (5th Cir.), cert. denied, ___ U.S. ___, 104 S. Ct. 482 (1983); Lilly v. Harris-Teeter Supermarket, 720 F.2d 326, 336, n. 20 (4th Cir. 1983), cert. denied, ___ U.S. ___, 104 S. Ct. 2154 (1984).

The unreviewed discretion of foremen to dismiss employees is, legally, highly suspect. When an employer has instituted policies of careful review of the decision to discharge an employee, and grants the employee at least an exit interview to air his side of the story, a court will be more likely to credit an employer's claim that it does not discriminate against blacks in terminations. See, e.g., Pouncy v. Prudential Insurance Co., 499 F. Supp. 427, 465 (S.D. Tex. 1980), aff'd 668 F.2d 795 (5th Cir. 1982).

The defendant did not criticize plaintiffs' statistical findings regarding terminations in its post-trial brief. The sole attack on these statistics, in almost 2,000 pages of the record of trial, comes almost as an afterthought:

> This morning we discussed in some detail the flaw that pervades all of the plaintiffs' analyses of lay-offs, particularly directing your attention to the marble example you gave, regarding the count of employee days, count periods of employment and count of employees. I believe at the time when we were discussing those exhibits I limited my question to, is it a flaw with their lay-off analyses?
>
> Now, as I recall the plaintiffs' exhibits in each one of those three areas for each plant, it included both lay-off and termination analysis. Does the same flaw which pervaded their lay-off analyses also pervade their termination analysis?
>
> A: The discharge analyses are constructed in the same way, as I understand them, and in my opinion they have the same fundamental problem that should make them completely unreliable.

Tr. 1477.

Since defendant's objection to plaintiffs' lay-off analysis with regard to its methods of measuring employee risk has already been discussed, supra at pp. 69-70, and the objection to the termination analysis is concededly identical to the objection to the lay off analysis, it is found that, as with the lay-offs, the plaintiffs' statistical model is sound. "In order to combat a case of class-wide discrimination based upon statistical evidence, defendant must either show flaws in the plaintiffs' statistics or provide a non-discriminatory explanation for the result." Boykin v. Georgia Pacific Corp., 706 F.2d 1384, 1393 (5th Cir. 1983). Defendant's attempt to show defects in the plaintiffs' termination statistics is rejected, since the plaintiffs' varied methods of measuring employee risk of termination are shown to be sound when used to measure risk of lay-off.

The defendant also attempted, by pointing to the fact that "no blacks were discharged for reasons that whites were not discharged for," Defendant's post-trial brief, Vol. II A, p. 84, to show a non-discriminatory explanation for the result. Of course, the fact that "no black was discharged for reasons that whites were not discharged for" does not necessarily mean that many more blacks were not discharged than whites under similar circumstances; or even that black conduct would not be construed differently than white conduct, when white foremen were allowed to discharge employees for reasons like "insubordination" and "excessive absence." As discussed previously, the subjective nature of the reasons for discharge, the lack of review of a foreman's decision to dismiss an employee, the absence of an employee grievance system, and the all-white staff who made these discretionary, unreviewed decisions, serve to support plaintiffs' termination statistics. The testimony of individuals such as Greg Jones and Leander Blair further bolsters plaintiffs' contentions.

Accordingly, it is found that defendant intentionally discriminated against blacks with regard to discharges at the East Plant.

The plaintiffs examined discharges at the West Plant, using the same three measures of employee tenure as were used in their statistical analyses of the East Plant: employee histories, employee

days, and periods of employment. There was a statistically significant difference in the rate of discharge of blacks compared to whites when employee histories were compared, but not when employee tenure was measured using either employee days or periods of employment. These statistics are not sufficient, standing alone, to support a finding of discrimination against blacks in discharges at the West Plant. Nor are the statistics sufficiently supported by the testimony introduced by individual witnesses at trial, since a single witness, Greg Jones, who had also been dismissed at the East Plant, testified that he had been discharged unfairly. Tr. 803. Accordingly, plaintiffs are found not to have met their burden of proof with regard to discharges at the West Plant.

THE INDIVIDUAL CLAIMS OF FOREST HENRY SHIPES

The named plaintiff, Forest Henry Shipes, alleges that defendant discriminated against him with regard to initial placement and pay, promotion, and lay-off.

Shipes applied at the East Plant on October 22, 1979. His application shows that he applied for a job as "welder-helper-laborer, janitor." His salary desired was "open." In his last job, he had made $5.60 per hour; the job prior to that, $3.81 per hour; and the job preceding it, which included tack welding and grinding for eight months, $5.09 per hour. He listed attendance at a welding trade school, without clarifying the length of time that he had attended. There were no interview notes whatever on his application form. The only notation reveals that he had been hired to work in Department E at $4.65 per hour, plus thirty cents an hour shift differential for working the night shift.

Shipes testified that, when he requested an employment application, he "asked them specifically what did they have open" and was told

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[68] Plaintiffs' Exhibit 3b. Although the application for employment Shipes filled out has a space for the employer to indicate what position the employee is hired to fill, the space was left blank, and only his shift, department, and pay rate are recorded. Shipes' pay rate change slips indicate he was originally hired as a fabrication helper B.

(apparently by both the receptionist and Louis Patterson) that the only vacancies were for laborer's and welder's helpers. Tr. 34-35, 59. Shipes then had a brief interview with Patterson, during which they chatted about topics unrelated to Shipes' welding skills. Tr. 36. Shipes was not given a welding test. Although he was interested in welding, Shipes was told by Patterson, that "there wasn't any [welder's positions] open now so there wasn't no sense in taking no welder test at the time." Tr. 61. Shipes was hired as a welder's helper B at $4.65 per hour, almost $1.00 less per hour than at his last job.[68] Shipes testified that he told his foreman, Jeff Rowe, that he wanted a position as a welder, and Rowe stated that as soon as a position opened up, he would give Shipes a welding test. Shipes worked in the Roofing Department, and testified that everyone in the department welded, doing very much the same job. Tr. 39. On December 14, 1979, Shipes' supervisor recommended him for a raise. The slip declared, "This Man has fine attendance, good work habits, and is learning to weld." This wage increase would also have promoted Shipes from a welder's helper B to a welder's helper A. On January 18, 1980, Shipes' pay was again raised, but only as the result of a plant wide increase of five percent. He never received a pay increase again.

Shipes testified that around March 1980, he became aware that his white co-workers were making higher wages than he was, and began to ask his superiors for a raise. Shipes worked his way through the chain of command, asking for an explanation from his lead man, his foreman, and eventually the assistant plant superintendent, Steve Randall, and the plant superintendent, Ray Jordan. Ultimately he spoke with the plant manager, Bobby Husted. Tr. 71-72. Shipes testified that initially Husted told him that he would get his raise; then his foreman informed him that he would not get it, because of a plant freeze in raises. He then discovered that several of his white co-workers had, nevertheless, received raises. Upon learning of this, Shipes went back to complain. He testified that he spoke with Randall, who told him "if I were to go back outside on the floor with this problem that they would take disciplinary action against me." Tr.

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[69] Defendant referred to Shipes fourteen times in its replies. Three times he was referred to as Mr. Shipes, once as Forest Shipes. The remaining ten references are to "Forest."

53. Two weeks later, on June 30, 1980, Shipes was laid off during a major lay-off at the East Plant.

Shipes filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) on July 10, 1980. (Plaintiffs' Exhibit 1a.) The EEOC sent defendant a series of questions with regard to Shipes' claim. In its response to the EEOC, defendant referred to Shipes for the most part as "Forest", e.g., "In April Mr. Husted, the plant manager, did talk to Forest and told him several times during the conversation that he was not promising Forest any increase, but only that he would review the situation with Forest's foreman." (Plaintiffs' Exhibit 1e, #14.)[69]

Defendant's position is essentially that Shipes was not qualified to be a welder at Trinity Industries. His six months of welding school, it is asserted, was far from sufficient to qualify Shipes for the more sophisticated kind of welding required at Trinity. Defendant called black employees at Trinity to testify to that effect. Tr. 1562-63. They stated that Shipes did not weld well, that he made mistakes, and that his attendance was poor enough to disqualify him from receiving a raise in June, when he became entitled to one under the plant's thirty-day/six month review policy. Defendant insists that Shipes' poor attitude, unsatisfactory performance, and spotty attendance led to his lay-off on June 30, 1980, rather than any racially discriminatory motive. However, both the plant manager, Bobby Husted, and the then-assistant plant superintendent, Steve Randall, testified that they believed Shipes had been a Welder C—undercutting somewhat their contentions as to his skill level, or at least as to the job he was performing. Tr. 875, 1200.

Plaintiffs countered these contentions with the argument that, within several weeks on either side of the date that defendant hired Shipes, it hired less qualified whites into more skilled positions at higher wages. But, the several documents in evidence are contradictory as to individuals hired around the time Shipes was hired, and also their qualifications. Since both plaintiffs and defendant stipulated to the accuracy of the data base (Defendant's Exhibit 32), and because plaintiffs also represented that their Exhibit 59a was a mere rearrangement of facts in the data base, Tr. 651, the data base will be relied upon. It appears that some of plaintiffs' figures are incorrect;

e.g., in their exhibit 63-7, Bobby McGee is listed as having been hired as a helper at $5.35 per hour on October 24, 1979; and in exhibits 59a and 63-7, Roy Eller is listed as having been hired as a welder at $5.91 per hour on November 6, 1979. McGee was actually hired as a helper on July 13, 1979, at $5.03 per hour, later resigned, and was rehired on October 24, 1979, as a welder, at $5.35 per hour. Eller, according to the data base, was hired as a welder on October 31, 1979, and was promoted on January 11, 1980, to $5.63 per hour. It was not until January 18, 1990, as a result of a plant-wide general increase, that he received $5.91 per hour.

However, there are some figures that all documents agree on. James Powell (Employee #17028), was employed on October 26, 1979, as a welder, at $5.35 per hour, the defendant's rate at that time for a welder C-1. Powell, who is white, had no direct experience as a welder. His experience was as a "mechanic, helper, Air Force." David Pauly (Employee #17077), another white man, was hired on October 29, 1979, as a welder, at $5.63 per hour, with one year of experience as a helper, and also experience as a spray technician at Heat Research. Greg Sharp, a white (Employee #17137), was hired as a welder, at $5.63 per hour, with one year of experience as a concrete finisher. Roy M. Gatewood (Employee #17140), also a white, was employed November 6, 1979, as a helper, at $4.54 per hour. He had no experience whatsoever.

It is uncontested that defendant did not give Shipes a welding test. Defendant vigorously claimed, throughout the trial, that it used "pay applied for" as a measure of the skills of an applicant. While Shipes wrote that his desired salary was "open", the fact that his previous pay at Trailmobile had been $5.60 per hour should logically have also operated to give defendant a measure of his skills. (Plaintiffs' Exhibit 3b.) It is true that Shipes wrote that the position he was applying for "welder helper—laborer, janitor"; this factor weighs in defendant's favor. It is explained, however, by Shipes' contention that he was told

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[70] Both Randall and Husted thought Shipes was a welder. Tr. 875, 1200. Two employees, Boston and Scott, said Shipes was welding. Tr. 1115.

[71] See definitions at p 22, supra.

that only helper's jobs were available. His testimony is supported by that of numerous other witnesses, including defendant's black witnesses, that Patterson, in substance, told black applicants that no welder's jobs were available. It need not be decided if Shipes was qualified for a position as welder C-1, although it seems likely that he was,[70] since it is clear that, with six months of welding school and eight months of experience tack welding, Shipes was eminently well-fitted to be at least a helper class A.[71] It is abundantly obvious that job openings and assignments were at least flexible enough to have permitted defendant to classify Shipes in that category. Thus, it is found that Shipes, a member of a minority group, was qualified for a position as a welder's helper class A, and was not hired into that position, while whites who possessed fewer qualifications, such as James Powell, Greg Sharp, and Roy Gatewood, were hired into higher-paying positions.

The defendant's reason for not hiring Shipes as a welder—that they had no openings and that his trade school training did not qualify him to be a welder—do not apply to its failure to hire Shipes as a helper class A. In addition, it is found that Patterson was disingenuous, when he told Shipes that there were no openings for welders. Finally, it is found that, without administering even the minimal welding test[72] that was Trinity's standard, defendant was not in a position to judge what Shipes' trade school education qualified him to do in the way of welding. Accordingly, it is also found that the reasons given by defendant for not hiring Shipes as a welder C-1 were also pretextual.

SHIPES' PROMOTION CLAIM

Although Shipes was given a merit increase on December 14, 1979, to Welder's Helper A, he never received another raise. By defendant's own rules, he was eligible six months after his first raise

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[72] Greg Jones' testimony regarding the welding test was fairly typical: "I wouldn't call it no welding test. It was just something that you just weld a bead across it and he'd just look at it and if it looked pretty good he could tell you to go back and give it to Ted Harris [a foreman] and he hired you."

See also Tr. 1106 (Ray Charles Boston); 730-31 (Arthur Hollie).

for a second promotion. Tr. 335. Thus, on June 14, 1980, Shipes was eligible for a raise to Welder C-1. Defendant claims that Shipes was not given the raise because of poor attendance and poor workmanship. Tr. 1206.

Shipes' first raise was accompanied by a note commenting on his "fine attendance," and a second raise request in April noted that, "He has learned to weld on all phases of roof, steady worker, is a good employee." Defendant's Exhibits 33b and 33d. Defendant claims that Shipes' workmanship was inferior and his attendance poor. However, it is impossible to draw conclusions about Shipes'—or any other employee's—attendance from the erratic, inconsistent, and often unfathomable attendance records kept by defendant. Apparently attendance records were not kept on an employee until he was absent at least once;[73] and the parties stipulated that absence data was incomplete or non-existent before January 10, 1980, and after December 1982.[74] Even worse, the manner in which attendance sheets were kept varies from employee to employee,[75] and two separate attendance sheets for Shipes were introduced.[76] Finally,

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[73] Tr. 339, 362. There is no indication as to whether tardiness or early leaving triggered the preparation of an attendance sheet.

[74] Defendant's post-trial brief, Vol. III, p. 38; Plaintiffs' and Defendant's Joint Exhibit 1.

[75] Compare, e.g., attendance sheets for David Stout with attendance sheets for Don Watson. Stout's attendance sheet has a number filled in for almost every day, presumably reflecting the number of hours worked, since most entries read "9 hours" and "10 hours". Watson's sheet is blank, except for numbers corresponding to reasons for absence, i.e., "2" for family illness.

[76] Defendant's Exhibit 33e and 82a. See colloquy in Tr. at 343-44, 430-435.

[77] Compare the contradictions among the statements of Steve Randall, then-assistant plant superintendent, who said no absence for medical reasons would be excused without a doctor's note, Tr. 1260, Tom Fleming, a foreman, who said such absences would be excused, Tr. 1537, 1539, and Bobby Husted and Louis Patterson, who both said that each absence was judged excused or unexcused essentially on a case-by-case basis, Tr. 830-31, 199-200, and 1631.

some of the attendance sheets do not follow the format prescribed thereon in reporting the reason for an employee's absence, with a number corresponding to the reason for the employee's absence. Given the fact that the defendant had no policy governing which absences were excused, and those which were unexcused, Tr. 831-32 (Husted), or how many absences constituted "excessive absence," or whether excused absences were counted against an employee,[77] it is found that defendant's concerns relating to absences were far too subjective, and the mode of recording them much too uncertain, to be able to give the dubious evidence introduced by defendant regarding absences any significant weight. Finally, it is noted that the defendant's own expert found that absenteeism was not correlated as a statistical matter with employment decisions made by defendant. Tr. 1445.

The defendant's other stated reasons for not giving Shipes a raise were that his workmanship was poor and his attitude was poor. Tr. 1274. These reasons are contradicted by the two written evaluations of Shipes done in December 1979, and April 1980, by his foreman, Jeff Rowe. "In determining whether an employee's job performance is satisfactory, courts may—as they often must—rely on the evaluations rendered by supervisors." Meiri v. Dacon, 759 F.2d 989, 995 (2nd Cir. 1985). In addition, the defendant's promotion system was so subjective and vulnerable to bias that its judgments about Shipes' attitude are particularly suspect:

> An employer may not utilize wholly subjective standards by which to judge its employee's qualifications and then plead lack of qualification when its promotion process...is challenged as discriminatory.

Harrel v. Northern Electric, 672 F.2d 444, 448 (5th Cir. 1982).

Moreover, the testimony of Steve Randall, assistant plant superintendent at the East Plant, makes it clear that Shipes was denied the pay raise because he had been complaining about discrimination in pay:

> Q: Did Mr. Jordan [plant superintendent] explain to Mr. Shipes why his raise request had been rejected? Did he

explain to him about the attendance?

A: Yeah, he explained it to him, because I was there when he told him. We had—see what transpired, if I can tell you.

Q: Sure.

A: Shipes was complaining in the shop quite a bit, and every time you would go through there he was complaining about he ought to have a raise, he was a better welder, a good welder, and so it got to the point where he was really disrupting production. He was stopping people from working wanting to know what they made, if they got a raise, and asking personal questions that really probably shouldn't have been asked on the job...Ray asked Mr. Shipes if he would stop asking people what they made, and if they had gotten raises...Shipes wanted to discuss the fact that he thought again that he should be an A welder. Well, that's when we went over the rate review that Ray had rejected. He talked to him about his attendance. He told him that he had missed twelve or fourteen—I'm not quite sure of the exact number and he would have to improve his attendance if he ever hoped to get a raise.

Since, as near as can be made from the attendance sheet forms, Shipes' attendance was not nearly as bad as Randall remembered, and since both Randall and Husted, the plant manager, who claimed to have seen Shipes' work, thought he was a C welder,[78] it is concluded that Shipes' promotion to C welder was denied because he had "a bad attitude." All the white supervisory personnel who were questioned about Shipes' attitude at trial agreed that he had a bad attitude.[79] Steve Randall testified that an individual who complained about pay could be considered to have a bad attitude. Tr. 1258. It is manifest that

[78] Tr. 875, 1200-01.

[79] Tr. 1273.

Shipes' protests, beginning in March, concerned his placement and pay. Since Shipes was claiming racial discrimination in his placement and pay, he was engaging in a protected activity under Title VII, 42 U.S.C. §2000-3(a). Therefore, it is concluded that the denial of Shipes' promotion was a retaliation for engagement in protected activities, and that it constituted an act of discrimination against him.

LAY-OFF

Finally Shipes claimed that he was laid off in retaliation for engaging in protected activities. Of all plaintiff Shipes' claims, this is the most difficult to determine, by reason of the fact that he lost his job in a lay-off that apparently eliminated one-third of the jobs in the plant. Tr. 104, 1209-10. It is clear that Shipes may only recover for discrimination in lay-off, if he would not have been laid off but for the discriminatory motives of defendant. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 282 n.10 (1976); Jackson v. City of Killeen, 654 F.2d 1181, 1186 (5th Cir. 1981). The racially discriminatory motive need not be the sole motive, however, for a court to find that the employer discriminated against the plaintiff. Garcia v. Gloor, 618 F.2d 264, 268 (5th Cir. 1980), cert. denied 449 U.S. 1113 (1981). In this case, while Trinity Industries did have a non-discriminatory motivation to lay-off Shipes (i.e., the need to substantially reduce its work force), it is concluded that the defendant would probable not have laid off Shipes, in the absence of his complaints about racial discrimination.

Plaintiffs performed an analysis of defendant's lay-offs, specifically covering the two weeks in which Shipes was laid off. The analysis revealed an impact adverse to blacks at a significance of greater than one in 1,000. In a race-neutral environment, 31.5 blacks could have been expected to be laid off; in fact, forty-eight blacks were laid off.

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[80] See p. 72, infra.

[81] It is to be observed that the termination report of another black, Homer Pilot, noted that he was a "labor instigator." While Louis Patterson conceded that this was true, Tr. 1628, the words were scratched out in the exhibit submitted to the court and even covered with a "defendant's exhibit" sticker. Defendant's exhibit 36d.

Plaintiffs' Exhibit No. 107. Defendant's expert conceded that this analysis was "very credible." Tr. 1830. Defendant was conducting its lay-offs during the two weeks surrounding Shipes' lay-off time in a significantly discriminatory manner, as plaintiffs' uncontested statistics showed,[80] and defendant was keenly aware of Shipes' contentions that he was being discriminated against in his pay. Further, the only written evaluations of Shipes in evidence state that he was "a fine worker" and a "good employee." Plaintiffs' Exhibit 3(b). Shipes was laid off about two weeks after a major confrontation with Jordan and Randall regarding his pay. Tr. 54. Jordan and Randall were key figures in deciding who was to be laid off at the East Plant. It is concluded that Shipes was laid off because he was black, and also because he was engaging in protected activity.[81]

Although plaintiffs also presented claims based on 42 U.S.C. §§1981 and 1983, these need not be addressed. "Consideration of these alternative remedies for employment discrimination is necessary only if their violation can be made out on grounds different from those available under Title VII." Rivera v. City of Wichita Falls, 665 F.2d 531, 534 n. 4 (5th Cir. 1982).

Accordingly, defendant is found to have intentionally discriminated against the class of black employees at the East Plant facility in initial placement and pay, promotions, lay-offs, and terminations for cause, and at its West Plant facility in initial placement and pay, and lay-offs.

Plaintiffs failed to sustain their burden of proof relative to discrimination in promotions and terminations at the West Plant. Defendant is also found to have deliberately discriminated against the named plaintiff, Forest Henry Shipes, in initial placement and pay, promotion, and layoff.

Plaintiffs are hereby ORDERED to present a brief on appropriate remedies within thirty days after service of this memorandum opinion upon their counsel. Defendant may have thirty days following service of plaintiffs' brief on its counsel to serve a reply brief on plaintiffs. A hearing on the issue of remedies will be scheduled thereafter.

SIGNED AND ENTERED this 10th day of October, 1985.

William Wayne Justice
CHIEF JUDGE

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION
NO. TY-80-462-CA

Forest Henry Shipes, et al., Plaintiffs,
v.
Trinity Industries, Inc., Defendant

ORDER

On June 12, 1991, Dr. Bernard Yancey, the court-appointed expert in the above-numbered and entitled civil action, submitted his final model to calculate back pay to be awarded plaintiff class members. At an in-chambers conference on June 25, counsel for both parties agreed to a hearing on final objections to the damage model scheduled for July, 9, 1991. However, this hearing was continued twice on motion of the defendants, due to defendant's inability to complete their review of Dr. Yancey's model, and was finally scheduled to be held on July 26, 1991.

On July 25, 1991, plaintiffs mo[illegible]o continue the hearing, because they had not had sufficient opport[illegible]ty to review Dr. Yancey's proposed modifications to his final damage model. These modifications, which suggested in response to defendant's objections to the final damage model, were submitted to the court and to counsel of July 24, 1991. On July 26, 1991, plaintiff's request for a continuance of the July 26 hearing was granted orally.

Having reviewed the reports by Dr. Yancey, and the briefs by counsel which have been submitted in response to the final damage model, it appears that several of the objections raised by counsel can be ruled upon on the basis of the papers already before the court. Further, it appears that there are only a few discrete issues for which additional briefing and a final hearing would be useful. Accordingly, this order will overrule the objections to the final damages model which are clearly not meritorious, and will set forth the outstanding issues for which further briefing and a final hearing is warranted.

Prior to the submission of the current documentation of the damage model, Dr. Yancey submitted to counsel an interim draft of the model, dated March 24, 1991 ("March 1991, draft model"). Both counsel filed objections to the proposed method of damage calculation contained in that draft. Since these objections have not been ruled upon previously, they are discussed below.

Plaintiffs object to including length of service information for white employees whose employment was terminated for cause in the caiculations to determine the expected length of service of plaintiff class members who were laid off or discharged for cause from the East Plant. The plaintiffs argue that all class members who were dismissed for cause at the East Plant should be presumed to have been wrongfully discharged, and that their expected length of service should be determined without reference to the length of service of white employees who were terminated for cause at the East Plant.

The final damage model presumes that each class member who was laid off or terminated at the East Plant is entitled to damages; however, in determining the projected cumulative length of service that these class members would have had absent discrimination, it is assumed that, had defendant employed race-neutral termination

practices, a proportionally equal number of white and black employees would have been dismissed for cause at the East Plant. Since there is no evidence that black employees as a class would be less likely than their white counterparts to be terminated for cause, it would be improper to exclude white employees who were terminated for cause from the length of service calculations.

In defendant's response to the March 1991, draft model, counsel for the defendant argued that the promotion damage model improperly used job history information about salaried white employees, and that it contained an error in the damage calculation formula.

The necessity of including the job history information of salaried employees who were hired as hourly employees in the promotion damage model was fully explained in an order issued on October 1, 1990, and has been addressed by Dr. Yancey in Appendix G of the June 1991, damage model. Briefly, the information regarding salaried employees who were hired as hourly employees must be included in the promotion damage model to fully compensate black class members who are similarly situated to these white employees, i.e., those employees who the promotion model determines would have been promoted to salaried positions absent discrimination.

The second concern of the defendant is also discussed by Dr. Yancey in Appendix G of the June 1991, final model. The March 1991, draft model for promotions used the higher of a particular plaintiff's expected or actual wage rate at the end of one quarter to determine that plaintiff's expected wage rate at the end of the next quarter. As Dr. Yancey explains, it was improper to include an individual plaintiff class member's actual end-of-quarter wage rate in the promotion damage model.

The formula used to determine the expected promotion history of an individual absent discrimination was derived by examining total wage increases of white employees throughout their tenure with the defendant, not their quarter by quarter progress. Because the expected promotion formula was derived in this manner, the damage calculation for plaintiff class members must likewise compare the class members'

total wage increase with their total expected wage increase. Factoring an employee's actual end-of-quarter wage into the promotion damage model uses the formula as though it had been developed to determine a particular class member's expected wage increases on a quarter by quarter basis. Since this is an incorrect and inaccurate use of the formula, the promotion damage model has been revised to use a plaintiff's expected end-of-quarter earnings for one quarter to determine his expected end-of-quarter earnings for the next quarter.

In addition to the objections to the draft version of the final damages model, defendant has raised several additional objections to the final damage model. However, its primary objection is essentially the same objection that was raised at a hearing on damages held in December 1990, and which was overruled in a order issued on December 27, 1990.

Defendant continues to maintain that the back pay calculations for the plaintiff class should be determined by for the plaintiff class as a whole and then awarded to each plaintiff on a pro rata basis. The defendants proposal apparently rests on the assumption that a class-wide finding of discrimination implies that each class member was impacted equally by the discrimination, and therefore, damages should be determined by comparing the class of white employees with the class of black employees. Because they contend that damages should be based on a class by class comparison they argue that the damage figure for the plaintiff class should be reduced by the amount which black employees were paid over the median salary paid to similarly situated white employees.

Defendant's proposed method of awarding damages is inappropriate. Although defendant was found liable for discrimination against the plaintiff class generally, clearly it cannot be assumed that such discrimination was uniformly felt by all class members. For example, evidence during the liability phase of these proceedings proved that defendant discriminated in setting the initial pay rates for black employees. However, it may be that some individual black employees were paid salaries greater than the median salary paid to white employees with similar qualifications. It would be unfair, and contrary to the purpose of back pay in a Title VII action, to lower the back pay award of a plaintiff class members who was paid less than

his white counterparts because of the salary earned by another class member. As the order issued on December 27, 1990, stated:

> This objection miscomprehends the purpose of the remedy phase of class action litigation. The Court of Appeals for the Fifth Circuit has described phase II, or the remedies phase, of a class action as follows:
>
> > At the start of a phase II trial, the employer faces a prior adjudication of class discrimination. The procedures thereafter assume that fact and are calculated to identify an individual claimant's relationship to the condemned practices without a second trial of the issue of class discrimination.
>
> Richardson v. Byrd, 709 F.2d 1016, 1021 (5th Cir. 1983).

Defendant's objections to the final back pay and promotion models which were submitted to the court on July 16, 1991, are based on their assertion that class-based relief is proper. As explained above, this assertion is unmeritorious. Since there are no other outstanding objections to these models, and they satisfactorily calculate the back pay to be awarded to class members for these types of discrimination, they will be accepted as the models to be used in calculating damages in this action.

In addition to objections to the initial pay and promotion models, defendant raised three basic objections to the lay off/termination[1] model in its submission of July 16, 1991. One objection is essentially

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[1] The East Plant employees receive damages for discriminatory layoffs and terminations, but the West Plant employees receive damages for discriminatory layoffs only.

[2] Even absent discrimination, a portion of the laid off/terminated plaintiff class members would have been retained but it would not have affected the lay off/ termination dates of other employees. However, it is impracticable to determine the impact of defendant's discriminatory lay-off and discharge practices on the length of service of individual class members who were laid off or dismissed at the East Plant. Therefore, the damage model calculates median lengths of service for plaintiff class members, and award a class member back pay if he actually worked less than the median length of service predicted for him.

the same objection that was raised with respect to the initial pay and promotion models, that is, that damaged should be determined on a class basis, and the amount of damages should be decreased to the extent that individual plaintiff class members were employed longer than the median length of employment for employees hired during the same time period. This objection will be overruled for the reasons set forth above, and in the court's order of December 27, 1990. The other objections to the lay off/termination damage model will be discussed below.

The lay off/termination damage model is intended to determine the number of days plaintiff class members who were laid off or terminated would have been expected to work absent discrimination, and to award these class members back pay if they actually worked less days than would have been expected.[2] The model determines number of days a given plaintiff class member would have been expected to work using two formulas, one for the period of time between a layoff/ termination(s) and subsequent re-hire(s), and a second for the period of time after a final layoff/termination.

For the period of time between layoff/termination and rehire, the model awards a plaintiff back pay based upon the difference between a) the median days worked by all employees, black and white,[3] during the quarters from the date of lay off through the date of re-hire and b) the actual days worked by the plaintiff during these quarters. For the period of time after final layoff/termination, the model calculates the difference between the actual days worked by a plaintiff after the date of final re-hire, and the median days worked for all employees initially hired in the same quarter as the plaintiff after the plaintiff's final re-hire date. Because small numbers of employees were hired in some quarters, and the median days worked fluctuates greatly quarter by quarter, the model determines median length of service for a given quarter using the length of service of employees hired in that particular

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[3] Average number of days has to be determined with reference to the average of black and white employees put together, because it must be assumed that absent discrimination the same number of employees would have been laid off, but more of them would have been white. In contrast, with respect to initial pay and promotions, it is assumed that absent discrimination, black employees would have received the same salary that white employees were paid.

quarter. and in the three previous quarters. A median determined in this manner is referred to as a "rolling median."

Defendant has raised two objections to this model. First they object to the use of median days of service per quarter to calculate the back pay for plaintiff class members for the period between lay off/ termination and re-hire. Second, they object to the use of a rolling median to calculate the median length of service for the period after final lay off/termination.

In his response to defendant's objections, Dr. Yancey has suggested that the lay-off/termination damage model be altered. He proposes that back pay awards for employees be determined soley with reference to the median length of service of all employees initially hired during the same time period as the plaintiff. For example, assume the median length of service for employees hired in February 1984, was from date of hire to March 30, 1988. A plaintiff class member initially hired on February 1, 1984, laid off on May 1, 1986, re-hired on November 1, 1986, and permanently laid off on December 15, 1987, would be eligible for back pay for the periods from May 2, 1984 to October 31, 1984; and December 16, 1987, to March 30, 1988. This alteration would eliminate the need to rely on the median-days-worked-in-a-quarter to determine back pay for the period between initial lay-off and subsequent re-hire(s).

Dr. Yancey also suggests that median length of service for employees could be calculated on an annual basis, i.e., length of service median for all employees hired in 1983, in 1984, etc. Dr. Yancey suggests that using an annual median may adequately compensate for the small number of hirings in some quarters, and eliminate the need for using a rolling median.

Based on the defendant's objections and the proposed modifications by Dr. Yancey, there appear to be two outstanding issues regarding the lay off/termination model. These are:

1) Should back pay for a plaintiff class member for discrimination in lay offs/terminations be determined by using the method proposed by Dr. Yancey in the final damages model issued on June 8, 1991, or

should back pay be determined solely by comparing the actual days worked by a plaintiff class member and the median days worked by employees initially hired in the same period as the plaintiff class member?

2) Should length of service medians for employees be determined using a) a "rolling median" of the length of service of all employees hired during the same quarter as the plaintiff class mei ber in question plus the three previous quarters, b) the median of all employees hired during the same annual period as the plaintiff class members in question, or c) the median of all employees hired during the same quarter as the plaintiff class member?

Since these are the only outstanding issues regarding Dr. Yancey's back pay model, discussion of back pay at the upcoming hearing will be limited to these three issues. In addition, the parties will be given the opportunity to present evidence regarding the proper scope of injunctive relief for the plaintiff class.

Accordingly, it is

ORDERED that counsel for both parties shall submit briefs on or *before August 12, 1991,* on the following issues concerning the back pay models in the above-numbered and referenced civil action:

1) Should back pay for a plaintiff class member for discrimination in lay offs/terminations be determined by using the method proposed by Dr. Yancey in the final damages model issued on June 8, 1991, or should back pay be determined solely by comparing the actual days worked by a plaintiff class member and the median days worked by employees initially hired in the same period as the plaintiff class member?

2) Should length of service medians for employees be determined using a) a "rolling median" of the length of service of all employees hired during the quarter as the

plaintiff class member in question plus the three previous quarters, b) the median of all employees hired during the same annual period as the plaintiff class member in question, or c) the median of all employees hired during the same quarter as the plaintiff class member?

Counsel shall furnish a copy of such briefs to Dr. Bernard Yancey, the court-appointed expert. Further, it is

ORDERED that Dr. Bernard Yancey, the court-appointed expert,

shall submit a report to the court *on or before August 12, 1991,* regarding the issues stated above, and he shall furnish a copy of such report to counsel for both parties. Finally it is

ORDERED that a *final hearing* regarding back pay and injunctive relief in this civil action shall be held on August 26, 1991, at 1:30 p.m. The scope of the hearing shall be limited to discussion of the above mentioned issues, and the proper scope of injunctive relief for the plaintiff class.

SIGNED this 29th day of July, 1991.

William Wayne Justice
William Wayne Justice
United States District Judge

CERTIFICATE OF SERVICE

A copy of the foregoing Appendix to Brief for Respondents Forest Henry Shipes, Et. Al. in Opposition was mailed to all counsel of record this _____ day of _____, 1993.

_____
Nell Hahn